IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. ____.

MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

BESSIE SEARS, DEFENDANT IN ERROR.

We have fully covered our objection to the court granting the writ of certiorari in this case in the brief filed resisting a like application, to which we respectfully refer the court and ask the court to consider that brief as the brief in this case. The facts, so far as the matter before the court, are practically identical with this, but there is one feature of the case which we mentioned in the Hill brief that we desire to again call the court's attention to. Mr. Sears paid two and one-half years' premium of $491 each *on ten-pay* life policy—that is to say, he paid one-fourth of the amount necessary to buy a policy of ten thousand dollars payable at his death or he fully paid for a $2,500 policy payable if by the terms of the policy he could have used the reserve for such purpose.

By the statute of New York relative to the reserve and by the terms of the policy, if he had paid another semi-annual premium of $246 he would have been entitled to a paid-up

policy of $3,000 or a policy of extended insurance for nine years. If the insurance company had served the statutory notice, then Mr. Sears would have been compelled to pay this additional sum or forfeit the right to this $10,000 insurance, and also the right to the paid-up policy of $3,000 or the $10,000 extended insurance. The payment of this $246 would have carried the full policy six months longer, at end of which time he could elect to keep it in force or let it lapse, and, in case he chose the latter, would have six months longer in which to surrender his policy and take the new fully paid-up policy for $3,000 or the policy of extended insurance for the full $10,000, running nine years longer, all fully paid for. In other words, the payment of $246 would have carried the original policy of $10,000 for six months, at which time, if the statutory notice was served, he would have to elect whether to pay the premium and keep the policy in force or let it lapse, and then, under the statute, have six months longer to elect which he would take, a paid-up policy of $3,000 or a policy of extended insurance of $10,000 for a term of over nine years, or five years beyond his death. Now, these were most valuable rights. This $246, which would have secured these most valuable rights, could have been borrowed from any reputable insurance company or from any party who had money to loan, with the policy alone as security. But Mr. Sears did not need to pay this premium or borrow the money to pay the premium or make any election of his rights, because he was never put in default. If the company had served the notice, then Mr. Sears would have had to make his election promptly and in strict and technical compliance with his contract and the statute. Neither the courts nor the company would have allowed him any departure therefrom. The courts are full of cases under the New York statutes where the insured has carried his policy beyond the three years required by the statute and then permitted his policy to lapse, and

failed, through ignorance of his rights or otherwise, to technically surrender his policy within the limited six months, and therefore too late to get either a policy of paid-up or extended insurance, though fully paid for. The courts have uniformly strictly enforced the time limit.

The company does not pretend to say it complied with the contract and statute in terminating and depriving Mr. Sears of these valuable rights. In fact, it admits it entirely ignored the statute. It does not claim that Mr. Sears ever received consideration for the alleged surrender of such valuable rights. As we have shown in the Hill brief, it does not allege any facts showing an estoppel, even if such defense was open to it. It does not pretend to say it was ignorant of its rights or duties; that it was misled by Mr. Sears' conduct; that it did anything or left anything undone by reason of such conduct. It is not claimed that it refrained from sending the notice on account of his conduct, but, on the contrary, without sending any notice immediately entered the policy on its books as a forfeited contract, and in all the alleged conversations with him thereafter treated it as a forfeited contract. As we have shown in the Hill brief, these defenses must fail, as it was the intent and purpose of the statute to entirely eliminate any such defense. We have shown that the statute could not be waived, directly or indirectly.

To protect the insured in his valuable rights above suggested was the very purpose of the statute, and the insured cannot be deprived of them except by a strict compliance therewith.

The New York court of appeals says:

"The purpose of the statute referred to was to establish a rule to preserve to the assured the benefits of premiums paid, and to prevent the lapse of policies without ample notice. * * *

"We are also of the opinion that the notice does not in its terms conform to the statute. Many ignorant and unlearned people seek to avail themselves of

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Supreme Court of the United States.

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No. 452.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

BESSIE F. SEARS, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF STEPHEN P. SEARS, DECEASED, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

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BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

In May, 1891, Stephen P. Sears, a resident of the city of Tacoma, in the State of Washington, made application there to a solicitor of the plaintiff in error for the policy of life insurance which is involved in this litigation. The application was in writing and contained a provision that it was made subject to charter of the company and the laws of the State of New York. It was sent by the agent to the home office of the company in New York city. The company there

accepted it, there executed the policy, and forwarded it to the Tacoma agent for delivery to Sears upon payment of the premium for the first year. Upon its arrival at Tacoma, Sears paid the premium to the agent, and received the policy from him. When transmitted from New York the policy bore the company's acknowledgment of the payment of the first premium. Among the provisions of the policy (Record, p. 5) are the following:

The application is a part of the policy.

The policy is payable at the home office of the company in New York.

The loss is payable upon acceptance by the company at his said home office of satisfactory proof of death.

All premiums after the first are payable at said home office, but will be accepted elsewhere when paid in exchange for the company's receipt signed by its president and secretary.

Notice of each succeeding due date is given and accepted by the delivery and acceptance of the policy, "and any further notice required by any statute is thereby expressly waived."

"That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim.

"In witness whereof the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary *at its office in the city of New York.*"

Sears paid the next premium (May, 1892), but did not pay any subsequent premium. He died in Tacoma on March 30, 1898. The defendant in error (the executrix of his will) brought this action upon the policy in the United States circuit court for the district of Washington, western (Tacoma) division. The defendant answered, setting up two affirmative defenses:

1st. The facts aforesaid in regard to the method of issuance and delivery of the policy and the non-payment of the 1893, 1894, 1895, 1896, and 1897 premiums.

2d. The same facts as in the first defense, with an added paragraph (VI), setting up certain alleged facts which occurred between Sears and itself after May 18, 1893, and before his death, as the basis of an estoppel *in pais*. A general demurrer was interposed to each of these affirmative defenses, and one to the answer as a whole. The demurrers were sustained, and, the company electing to stand upon its answer and not plead further, judgment was entered against it for $7,470.46. This amount was arrived at by deducting the amount of the passed premium, with interest from the due date of each, from the face of the policy ($10,000). The company prosecuted a writ of error from the circuit court of appeals, which resulted in an affirmance of the judgment. This court having issued its writ of certiorari to review that judgment of the circuit court of appeals, the case is now here as upon writ of error to that court.

The circuit court and the circuit court of appeals, following the decisions of the court of appeals of the State of New York and the current of authority, ruled that—

The case and policy is controlled by the anti-forfeiture statute of New York.

The attempted waiver thereof in the policy was ineffectual.

The plea of estoppel is insufficient.

ARGUMENT.

I.

The New York Statute Applies to and Controls the Policy.

There are three reasons which support this proposition. They will be discussed under subheads 1, 2, and 3, following:

1.

THE CONTRACT TOOK EFFECT (WAS MADE) AND WAS WHOLLY TO BE PERFORMED IN THE STATE OF NEW YORK.

The foregoing statement of the case shows clearly that every act of either contracting party relating to *performance* of the contract is required to be done in the State of New York. It is, however, true that the first premium was paid at Tacoma. The policy permitted it and the company accepted it. It is also true that the policy permitted the company to yield the requirement of payment in New York of any subsequent premium if it chose to send out in advance its official receipt therefor.

The application was accepted in New York and the policy there issued and mailed for delivery at Tacoma, but as so issued it was complete and bore the company's acknowledgment of payment of first premium. So that the contract became complete there. In this connection there is a distinction to be noted between the case at bar and the Phinney case. In the latter case it appeared from the record that the application contained a provision that the policy "shall not take effect until the first premium shall have been paid and the policy shall have been delivered during my continuance in good health," a fact which does *not* appear in the record in the case at bar.

The place of performance being the State of New York (even though partial execution took place in Washington), the contract is governed by the New York statute.

This is the law as established by numerous decisions of this court. It is so announced by Mr. Justice Harlan:

"The contract, therefore, was one which in all its parts was to be performed in England. Nevertheless, it is contended that the principal sum agreed to be paid should bear interest at the rate of seven per cent., fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that State. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law was in the view of the parties when the contract was executed. For, as said by Chief Justice Marshall in Wayman *vs.* Southard, 10 Wheat., 1, on p. 48, it is a principle, universally recognized, that 'in every forum a contract is governed by the law with a view to which it was made.' And by Lord Mansfield in Robinson *vs.* Bland, 2 Burrow, 1077, 1078, 'The parties had a view to the laws of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed. Now here the payment is to be in England; it is an English security, and so intended by the parties.'

"Referring to these and many other cases, this court, speaking by Mr. Justice Matthews, held, upon full consideration, in Pritchard *vs.* Norton, 106 U. S., 124, 136, that the law upon which the nature, interpretation and validity of a contract depended, was that which the parties, either expressly or presumptively, incorporated into it as constituting its obligations." Coghlan *vs.* South Carolina R. R. Co., 142 U. S., 101–109.

In another case the Supreme Court of the United States was called upon to pass upon the above question of law on a state of facts almost identical with the facts of this case. Mr. and Mrs. Hume were living in the city of Washington, District of Columbia, when they made application to the

Connecticut Insurance Company of Hartford, Connecticut, for a policy of insurance, and the question came squarely before the court whether the laws of Connecticut or the laws of the District of Columbia should prevail in governing the rights between Mrs. Hume, the beneficiary, and the creditors of the deceased husband. The court finds the following facts:

"On the 13th day of June, 1881, the Connecticut Mutual Life Insurance Company of Hartford, in consideration of an annual premium of $350.30, issued a policy of insurance upon the life of Thomas L. Hume, in the sum of ten thousand dollars ($10,000) for the term of his natural life, payable at Hartford, Connecticut, to Annie G. Hume and her children by him or their legal representatives. The application for this policy was signed 'Annie G. Hume by Thomas L. Hume.' It was expressly provided as a part of the contract that the policy was issued and delivered at Hartford, in the State of Connecticut, and was 'to be in all respects construed and determined in accordance with the laws of that State.'"

In another part of the statement it appears that Mr. Hume lived in Washington, D. C., and died at that place October 23, 1881.

Upon the above state of facts the United States court, in an opinion written by Chief Justice Fuller, states the law as follows:

"Mrs. Hume was confessedly a contracting party to the Maryland policy; and as to the Connecticut contracts, the statute of the State where they were made and to be performed, explicitly provided that a policy for the benefit of a married woman shall inure to her separate use or that of her children, but if the annual premium exceed three hundred dollars (300.00) the amount of such excess shall inure to the benefit of the creditors of the person paying the premium.

"The rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of per-

formance, and the stipulation of the parties was made with reference to the laws of that place.

"And if this be so as between Hume and the Connecticut companies, then he could not have, at any time, disposed of these policies without the consent of the beneficiary nor is there anything to the contrary in the statutes or general public policy of the District of Columbia."

Washington Central Bank *vs.* Hume, 128 U. S., 195, on pages 197 and 206.

A recent decision of the United States Supreme Court (London Assurance *vs.* Companhia de Moagens Do Barreiro, 167 U. S., 149) is to the same effect. In that case there was not so much in the contract to show the intent of the parties as to the place of the contract as there is in the case at bar. The following quotation from the decision last cited will suffice to show its pertinency:

"Under the circumstances we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia by its agents, and that contract, by its terms, was to be performed in England. The parties to it understood and agreed that, in case of loss or damage to the interest insured under the certificate the same was to be reported to the corporation in London, and to be paid in sterling at its office in the Royal exchange in the city of London, and the claims were to be adjusted according to the Lloyds, but subject to the conditions of the policy and the contract of insurance. Generally speaking the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has *agreed* to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own."

In the Baxter case, 119 N. Y., 450 (commented upon more fully *infra*), the policy was upon the life of one Matteson, a

resident of Pennsylvania. (See Appendix.) The policy provided:

"This policy is a contract made and to be executed in the State of New York and shall be construed only according to the laws of that State."

In passing upon the question of the applicability to the policy of the anti-forfeiture statute of New York the court of appeals said:

"The policy itself contained the stipulation that it was a contract made and to be executed in the State of New York, and construed only according to the laws of that State. Aside from the provisions of the policy, and under general rules of law, the contract was subject to the terms and conditions expressed in chapter 341 of the Laws of 1876, as amended by chapter 321 of the Laws of 1877. This statute was a part of the contract in question and governed the rights and obligations of the parties in precisely the same way, and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

The circuit court of appeals for the sixth circuit, in a very recent case, in an opinion by Judge Taft, says:

"There can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application, which is made part of the policy, that 'the place of contract shall be the city of Philadelphia, State of Pennsylvania.' In Weyman *vs.* Southard, 10 Wheat., 1–48, Chief Justice Marshall stated it to be a principle of universal law that 'in every form a contract is governed by the law with a view to which it is made.' (See Pritchard *vs.* Norton, 106 U. S., 124, 136; 1 Sup. Ct., 102, and cases there cited.) In this case no necessity exists for presumption from the circumstances, because the intention of the parties is expressed."

Penn. Mutual Ins. Co. *vs.* Savings Bank, 72 Fed., 413; 19 C. C. A., 286.

Also—

Equitable Life Assurance Society *vs.* Nixon, 26 C. C. A., 620; 81 Fed., 796.
Equitable Life Assurance Society *vs.* Trimble, 27 C. C. A., 404; 83 Fed., 85.
Phinney *vs.* Insurance Co., 67 Fed., 493.
Griesemer *vs.* Mutual Life Ins. Co., 10 Wash., 202–212.
Hall *vs.* Cordell, 142 U. S., 116, at page 120.
Pritchard *vs.* Norton, 106 U. S., 124, at pages 136 and 137.
Steamship Co. *vs.* Phenix Insurance Co., 129 U. S., 397.
Hyde *vs.* Goodnow, 3 N. Y., 266–269.
Griffith *vs.* Insurance Co., 101 Cal., 627; 36 Pac., 113.
Goodwin *vs.* Insurance Co., 97 Ia., 226; 66 N. W., 157, at page 160.
Massachusetts Insurance Co. *vs.* Hale, 23 S. E., 849; 96 Ga., 802.
Mullen *vs.* Insurance Co., 89 Texas, 259; 34 S. W., 605.
Insurance Co. *vs.* Pollard, 94 Va., 146; 26 S. E., 422.
Richardson *vs.* Rowland, 40 Conn., 565.
Bennett *vs.* Eastern Building Ass'n, 177 Pa. St., 233; 35 Atl., 684.
Equitable Ins. Co. *vs.* Frommhold, 75 Ill. App., 43.

The cases relied upon by plaintiff in error against this contention of defendant in error do not so hold. The one chiefly relied upon is the case of Wall *vs.* The Equitable Life Insurance Company, 140 U. S., 226.

In the first place, there was no provision in the contract (either in the policy or application, which together make one contract) stipulating that the contract should be subject to the laws of New York.

In the second place, the Equitable Insurance Company, as a matter of comity, not of right, was permitted by the State of Missouri to come into that State and make contracts with the citizens of Missouri. Having been thus permitted to come into the State to make contracts with its citizens, it was

perfectly competent for the State of Missouri to impose such terms upon it and like companies as the State saw fit or exclude the foreign insurance companies altogether from their territory.

Bank *vs.* Earle, 13 Peters, 519.
Runyan *vs.* Coster, 14 Peters, 122, at page 129.
Hooper *vs.* State of California, 155 U. S., 648.

The legislature had passed an act regulating the forfeiture of life-insurance policies after the paying of two annual premiums, to the effect that the insured should have the benefit of his reserve by the way of extended insurance. This statute established the public policy of the State of Missouri relative to such contracts. By another provision of the law, it was made the duty of any foreign insurance company, if it accepted the privilege of doing business in that State, to make all its contracts in compliance therewith. The section last mentioned is in the following words:

"SECTION 5983. No policy of insurance on life, hereafter issued by any life insurance company authorized to do business in this State on or after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, become forfeited or void by reason of the non-payment of premium thereon, but it shall be subject to the following rules and commutations, to wit: * * * *"

The policy in the Clements case was issued after the first day of August 1879 as provided in the above section. It must be presumed the company was authorized to do business within the meaning of that section. If so, then it accepted the terms provided in the statute and was bound to make no contract of forfeiture in disregard of the statute. But this it did attempt to do, even though the contract was actually consummated in Missouri. This court held two things—first, that the contract was a Missouri contract, as it was there consummated; second, and more important than the above, it held that this statute could not be waived by

the parties. If the statute could not be expressly waived by the parties because of the provision of the statute above set forth (which is copied in the opinion of the court), then it must follow that it could not be done indirectly by making the place of contract outside of Missouri in order to avoid this statute. It would be a strange rule of law that would hold the parties could not waive a statute of Missouri and yet hold that it was competent for the parties to avoid the statute by making the place of contract elsewhere. It needs no authority to support this distinction. It suggests itself forcibly and distinctly. No other result could be reached logically.

This same doctrine with reference to this same Missouri statute is very forcibly set forth in a decision rendered by Judge Treat, in which Judge McCrary concurred.

Fletcher *vs.* Insurance Co., 13 Federal Reporter, 526.

In a subsequent case the above opinion was cited with approval by Mr. Justice Brewer, sitting as district judge.

Ball *vs.* Insurance Company, 32 Federal, at 273, at page 275.

In a subsequent case Judge Caldwell, sitting in the same circuit, concurred with Judges Treat, McCrary, and Brewer in the opinions above referred to.

Berry *vs.* Indemnity Company, 46 Federal, 139, page 141.

Each of the other cases heretofore relied upon can be distinguished in the same way. In each case there was an attempt to make the place of contract in a State other than the one in which the insured lived, in order to avoid the public policy or statute of the State where the contract was actually consummated. These cases for this reason are not in point. In none of the cases cited, except the one in the 54 Fed., 580, which was affirmed in the 58 Fed., 723, was

there a stipulation that the place of contract was other than the place where the contract was actually consummated. The circuit court of appeals, in affirming this decision of the 54 Fed., entirely ignores the point so strenuously insisted upon, but bases its decision on general laws entirely outside the applicability of the Iowa statute. One cannot read the two cases without at once being convinced that the circuit court of appeals did not consider the decision of the lower court sound on the question of the "place of contract." But if it had, it would not be in point, because the stipulation making it a New Jersey contract to avoid a statute establishing the public policy of the State of Iowa would have been void. We ask the court's careful attention to the decision of the circuit court of appeals in connection with the 54 Fed., believing as we do that there is nothing in it to support plaintiff in error's claim.

So considering the opinion of the Clements case wholly in connection with the facts in the case, it is very apparent that the true basis of the decision was that the assured, living in Missouri, and the insurance company doing business in Missouri must be subject to the public policy of the State of Missouri, and that it would not allow the parties to withdraw themselves from the beneficial effects of the public policy and the statute of Missouri by making the place of contract outside of the State of Missouri.

The distinction between the Clements case and the case at bar is taken by Judge Ross, of the ninth circuit, in Nixon *vs.* Equitable Life, 81 Fed., 796; 26 C. C. A., 620 (afterwards followed on facts like the case at bar in the Trimble case, 27 C. C. A., 401), as follows:

"When the application and the applicant's money were accepted by the society the contract between the parties became complete. This was done in the State of New York. Not only so, but, as has been seen, all the conditions of the

policy were to be performed in the State of New York; the premiums were to be paid in that State; proof of loss, if any, was to be there made, and the payment agreed to be made by the defendant corporation in the event of the death of the assured was to be made in the State of New York. *It would seem to be very clear, therefore, that the rights and obligations of the respective parties are to be measured and controlled by the laws of that State, subject, perhaps, to any additional limitations or conditions imposed by the statutes of the State (then Territory) into which the defendant corporation went to solicit the business in question, for it may be true that every foreign corporation that enters a State other than that of its creation, and there transacts business, does so in subordination to the statutes of the State permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can, by any sort of contract, be removed from the operation of the statute of the State permitting the business to be transacted. But in the present case, as has been said, there is no Washington statute affecting that portion of the policy here in question. * * * There is nothing to the contrary in the case of Society vs. Clements, 140 U. S., 226, so much relied on by the plaintiff.*"

2.

THE NEW YORK STATUTE IS A LIMITATION UPON THE POWER OF THE PLAINTIFF IN ERROR, A NEW YORK CORPORATION, ATTENDING IT WHEREVER IT TRAVELS.

If this proposition is sound, it establishes the applicability of the statute, regardless of the place of execution or performance of the contract.

The proposition is laid down by the supreme court of Maryland upon the following state of facts:

A Pennsylvania corporation received an application in Baltimore, delivered the policy there on receipt of the first premium in Baltimore, Maryland. The law of Pennsylvania above cited contains a further provision that "Whenever an application for a policy of life insurance contains a clause of warranty of the truth of the answer therein contained, no

misrepresentation or untrue statement in such application, made in good faith by the applicant, shall affect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application unless such misrepresentation or untrue statement relates to some matters material to the risk."

The company, regardless of this statute, made every answer in the application an absolute warranty, and were insisting on the breach of the warranties as a defense. They insisted that the law did not apply. The supreme court on this point used this language:

"But the statute of Pennsylvania, which was offered in evidence, enacts that in such cases no misrepresentation or untrue statement in the application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense unless it relates to some matter material to the risk. It is beyond question that the powers and capacities of a Pennsylvania corporation are conferred and regulated by the laws of that State. Without its authority it could not exist at all. Every contract it makes, every act it performs, every right it acquires, and every obligation it assumes must be by virture of the same authority. It may make contracts, transact business, sue and be sued, beyond the limit of the State of its origin. But all these transactions are by the permission of the State where they occur, and not by virtue of any right belonging to the corporation. Everywhere within and without the State which created it, its contracts are limited, construed, and sustained according to its charter and the laws which affect its operation. In McKine *vs.* Glen, 66 Md., 484, this court said: 'It is a familiar principle that a corporation and all who deal with it are bound by the laws of its creation, and all such laws as may be legitimately prescribed for its government by the sovereign authority from which it derives its corporate existence.'"

Insurance Co. *vs.* Ficklin *et al.*, 74 Myd., 172, on p. 180.

A like rule is laid down by the Supreme Court of the United States. In one case a Missouri insurance corporation became insolvent. It had both property and creditors

in Louisiana. The creditors went into court and had a local receiver appointed. By the Missouri statute, the insurance commissioner of that State was the party who took possession of the effects and wound up the affairs of such corporations. The question as to whether the Louisiana receiver, who was the first to get possession of the effects in that State, or the insurance commissioner of Missouri should have possession of the property in Louisiana, the court was called upon to decide, and in its decision used the following language:

"Relfe is not an officer of the Missouri State court, but the person designated by law (the Missouri State law) to take the property of any dissolved life insurance corporation of that State and hold and dispose of it in trust for the use and benefit of creditors and other parties interested. The law which clothed him with this trust was in legal effect part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. * * * We are aware that, except by virtue of some statutory authority, an administrator appointed in one State cannot generally sue in another, and a receiver appointed by a State has no extraterritorial power. But a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. * * * No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with, perhaps, the exception of commercial corporations; but if it does, without limitation express or implied, the corporation comes in as it has been corporated. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

Relfe *vs.* Rundle, 103 U. S., 222, pp. 225–226.

The same rule was laid down in Fry *vs.* Charter Oak Life Ins. Co., 31 F. Rep., 197.

In a later case the United States Supreme Court adheres

to the rule above stated. The following citation will not show fully how far that court carried the rule; a careful reading of the case will only disclose that:

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (Bank of Augusta *vs.* Earl, 13 Pet., 588), though it may do business in all places where its charter allows and the local laws do not forbid (Railroad *vs.* Koontz, 104 U. S., 12). But wherever it goes for business it carries its charter, as that is the law of its existence (Pelps *vs.* Rudle, 193 U. S., 226), and the charter is the same abroad as it is at home. Whatever disabilities are placed on the corporation at home it retains abroad, and whatever legislative control it is subject to at home must be recognized and submitted to by those who deal with it elsewhere. * * * He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony."

Canada So. R'y *vs.* Gebhard, 109 U. S., 527–537.

The supreme court of California so holds in passing upon the identical statute involved in this case, as follows:

"It would seem, however, that the New York statute was intended to cut deeper, and as a matter of public policy to inhibit forfeitures by life insurance companies, except by the method therein provided. * * *

"The statute is a limitation on the power of the company to do a specified thing, except under prescribed conditions. That which a corporation has not the power to do, if attempted to be done by it, is *ultra vires*, and void. * * *

"A corporation being the creature of the law must confine its functions to the limits prescribed for its action, and if the law expressly inhibits it from doing a given thing it is powerless to do that thing, and, if it can do it only in a given manner, the prescribed method becomes the measure of its power.

"We are not met with any suggestion that the statute in question is violative of any chartered right of the defendant, and, in the absence of a showing to the contrary, must

assume the New York statute to be in consonance with its constitutional and chartered rights.

"The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away.

"The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them."

Griffith *vs.* New York Life Ins. Co., 101 Cal., 627, on pp. 641, '2.

The supreme court of Texas has held that a contract made between a railroad chartered by Missouri and one of its officers in Texas, where the contract was to be wholly performed, but which was contrary to the statute of Missouri prohibiting such corporations from making any contract with one of its directors, was absolutely void. Its opinion in part is as follows:

"Appellee owes its existence to the constitution and laws of the State of Missouri, under and by virtue of which it obtained its being and from which it derived all its powers. Natural persons may make any contract or perform any act not prohibited by law, while artificial persons—corporations—can do only those things which by express grant or necessary implications they are authorized or empowered to do by the State under which their charters were obtained. * * * Had the contract been entered into by the president and secretary of the company, after resolution adopted by the board of directors authorizing them to make it, and had it been executed with strict observance of all formalities, it would have been void, because it was prohibited by the laws of the State from which appellee derives its existence and powers."

Rue *vs.* Missouri Pac. R'y Co., 74 Tex., 474-479.

The point is expressly decided by the court of appeals of Illinois in Equitable Ins. Co. *vs.* Frommhold, 75 Ill. App., 43, from which we quote:

"Appellant's counsel contend, first, that the contract was consummated in this State, and therefore that the New York statute has no application; and, secondly, that even though it be conceded that the statute applies, the policy was declared forfeited in conformity with its requirements. The argument of appellant's counsel on the first proposition consists of the discussion of the question whether the contract of insurance is a New York or an Illinois contract, apparently assuming that if it is the latter the New York statute can have no application, it not being a part of the contract and the contract making no reference to it. In this assumption we cannot concur. The question is one of power in the appellant corporation, namely, whether it had power to declare the policy forfeited otherwise than as prescribed by the New York statute. The validity of the statute is not questioned, nor is it questioned that appellant did business in New York or that the policy is such as is within the prohibition of the statute."

The court then discusses the question at great length as to whether or not this statute is a limitation on the power of the corporation. It shows, by reason and in entire accord with the great weight of authority, that such is the case. We ask the court's most careful attention to this case. It discusses the question fully and in a most able manner. It closes the discussion in these words:

"Our opinion being that the appellant is, by reason of the New York statute, powerless to declare a policy of insurance forfeited, otherwise than as therein prescribed, and that irrespective of the question whether the policy is a New York or an Illinois contract, a decision of the latter question is unnecessary. However, inasmuch as the application was forwarded to New York and there accepted, and the policy was there issued and returned to Chicago for delivery, and the premiums and the amount issued were, by the policy, expressly made payable in New York, authorities

are not wanting in support of the proposition that New York is to be regarded as the place of the contract (Phinney *vs.* Mutual Life Ins. Co., 67 Fed. Rep., 493)."

3.

THE LEGISLATURE INTENDED BY THE ACT OF '77 THAT ITS PROVISIONS SHOULD APPLY TO POLICIES ISSUED UPON THE LIVES OF NON-RESIDENTS AS WELL AS RESIDENTS OF NEW YORK, WHATEVER BE THE PLACE OF CONTRACT OR WHEREVER THE PREMIUMS BE DEMANDABLE.

If this proposition is sound, the applicability of the statute is established regardless of the place of execution or performance of the contract.

It was persistently urged by the plaintiff in error in the lower court, and we presume will be here, "that the statute of 1877 has never been construed by the court of New York to require notices to be sent of premiums demanded or permitted to be paid outside of New York State." Notwithstanding this claim, it is nevertheless true that the court of appeals of New York has twice decided that it is incumbent upon insurance companies incorporated by the State of New York to send the statutory notices to non-residents where in one case the premiums had for several years been demanded and paid outside of New York, and in the other case the company had a right to demand payment of premiums outside of New York. The first case is that of Carter *vs.* Ins. Co. (110 N. Y., p. 15). Mr. Carter took out a policy of insurance in the Brooklyn Life Insurance Company, a corporation chartered by the State of New York. The contract was made six years before the enactment of the statute of 1876.

Mr. Carter paid his premiums prior to 1877 in Georgia, but for 1878 to 1882 he remitted to New York. In

1883 the company failed to serve him with the statutory notice. Here was a policy-holder residing in Georgia. Here the company had been accustomed to collect the premium in Georgia and later in New York. The court held that it was incumbent upon the company to serve the statutory notice on Mr. Carter, a resident of Georgia, and in so deciding used this language:

"Upon this state of facts several questions arose upon the trial among which the material ones are:

"First. Whether the law of 1876 requiring notice to be sent to the policy-holders, applies to this policy? * * *

"It is contended by the appellant that the act applies only to policies 'issued or renewed' after its passage, and that a policy cannot be said to have been renewed unless it has become forfeited or lapsed, and has been afterward restored or renewed by the insurance company.

"The language of the statute, as expressed in the laws of 1876, is that 'no life insurance company, doing business in the State of New York, shall have power to declare forfeited or lapsed any policy thereafter issued or renewed, by reason of non-payment of annual premiums, or interest, or any portion thereof, unless a notice in writing stating the amount of the annual premium or interest due, and when due on such policy, and the place where said premium or interest may be paid shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, at his or her last-known post-office address, not less than thirty days nor more than sixty days next before such payment becomes due according to the terms of such policy.' This act was amended by chapter 321, Laws of 1877, but, so far as this case is concerned, in no respect rendering a particular notice of the amendment necessary. The act should be construed according to the popular signification of the language used, and with the view of securing to the policy-holders in life insurance companies the benefits contemplated by the legislature. * * *

"We are also of the opinion that the payment, and receipt by the company, of each annual premium constitute a renewal of the policy within the meaning of the term 'renewal' as used in the act.

"While it was provided by the policy that it should con-

tinue for the term of the natural life of the assured, it was expressly provided that this was upon the condition that he should pay the annual premiums as they become due by the terms of the policy. A failure to pay such premiums in any year was declared to render the policy null, void, and of no effect, but when paid it continued by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the policy as it approached the period of its agreed termination. * * *

"We are, therefore, of the opinion that the plaintiff's policy was renewed within the meaning of the act. We are also of the opinion that no such notice was given to him as the statute required. The law reads that the notice should be sent to the assured at his known place of address, and there is no claim but that the defendant knew his place of address at all times subsequent to the year 1880."

To the same effect is the case of Baxter *vs.* Ins. Co., 119 N. Y., 450. The defendant in that case was a corporation chartered by the State of New York. In May, 1884, it insured one J. J. Matteson. It does not appear from the opinion or statement by the court of what State Mr. Matteson was a resident. In the case of Mutual Life Ins. Co. *vs.* Phinney, No. 12 of this term, we filed copies of the complaint, answer, policy, and case and exceptions, all duly certified as correct by the clerk of the court of appeals, all of which are printed in the appendix to this brief. The policy provided for the payment of same upon proof of the death of the insured, "Joel J. Matteson, of Bradford, in the county of McKeon, State of Pennsylvania." The policy was issued in May and the insured died about four months thereafter, or a month after the second quarterly premium became due by the terms of the policy. The evidence showed that for ten years prior to his death he lived in Pennsylvania, where he died. It will be noticed also that the policy provides no particular place for the payment of the premium, so in this case the company had a right to demand the payment

of premiums at the home of Mr. Matteson in Pennsylvania. In case of such demand Mr. Matteson would have had no legal right to make payment elsewhere. So here we have a case where the insured was a non-resident of New York, and "where the premium could be demanded and could be paid outside of New York." After Mr. Matteson's death Mrs. Matteson assigned the policy to Mr. Baxter, presumably a citizen of New York, between whom and the company a controversy arose over the payment of the policy. The company claimed the policy was forfeited by Mr. Matteson in his lifetime on account of the non-payment of a quarterly premium. There was no proof offered by either party as to the service of the statutory notice, Mr. Baxter claiming that under this statute it was not necessary for him to prove that the company had not served the notice, the company contending that it was. The court held that it was incumbent on the company to prove the service of this notice on Mr. Matteson, a resident of Pennsylvania, as condition precedent to its right to defend on the ground of a forfeiture of the contract for non-payment of the stipulated premium, and, in so deciding, the court uses this language:

"The policy itself contained the stipulation that it was a contract made and to be executed in the State of New York, and construed only according to the laws of that State. Aside from the provisions of the policy, and under general rules of law, the contract was subject to the terms and conditions expressed in chapter 341 of the Laws of 1876, as amended by chapter 321 of the Laws of 1877. This statute was a part of the contract in question and governed the rights and obligations of the parties in precisely the same way, and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

The circuit court for the district of Washington in the case of Phinney *vs.* The Mutual Life Insurance Company (67 Fed., 493) discusses the statute from the same point of view (p. 497) in this language:

"I think that the binding force of the statute applies to all companies equally. It applies to all New York companies as to all business which they do in that State, and it applies to Connecticut companies as to all business which they do in New York. I think that if a Connecticut company having an office in New York, writing and issuing policies there, collecting the premiums there, and doing all the business of life insurance companies in the State of New York, should receive an application at its office in New York from Washington, act upon it there, issue a policy there, which by its terms will be performed in the State of New York, the contract would be governed by the law of New York just the same as though its incorporation was under the law of New York instead of being under the law of Connecticut. This statute has been upheld by so many decisions that it is beyond question a valid statute with respect to all business transacted within New York. Now this transaction, although the contract was made in the State of Washington, is business done in New York. The policy was written there. The default of the insured and right of forfeiture could only occur in New York, because there could be no default in payment until on the date when the premiums were due the insured failed to pay the premiums in New York. There is where the default occurred upon which alone this company can claim to be released from its liability under the policy."

To illustrate the unwillingness of the courts to give the statute the narrow construction contended for by the plaintiff in error, we call the attention of the court to the case of Hebb *vs.* Insurance Co., 138 Pa. St., 174–180; 20 Atl., 837. The case was upon a policy of fire insurance issued by the defendant, a Pennsylvania corporation, upon property located in the State of West Virginia. The question arose as to whether the application was a part of the contract, it being referred to therein, but not being attached thereto. The statute of Pennsylvania of May 11, 1881 (Public Laws, 20), provides "that all life and fire insurance policies upon the lives or property of persons within this Commonwealth, whether issued by companies organized

under the laws of this State or by foreign companies doing business therein, which contain any reference to the application of the insured, or the constitution, by-laws, or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contracts, shall contain or have attached to said policy correct copies of the application as signed by the applicant, and the by-laws referred to, and unless so attached and accompanying the policy no such application, constitution, or by-laws shall be received in evidence in any controversy between the parties to or interested in the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties." (We find the statute in the brief of counsel in the case of New Era Life Insurance Co. *vs.* Musser, 120 Pa., 384: 14 Atl. Rep'r, 155.) Upon this question the supreme court of Pennsylvania in the case cited says:

"It is urged, however, that this act of 1881 applies only to policies upon the lives or property of persons within this Commonwealth, and that as the property insured by the defendant was located in West Virginia the rule above stated does not apply. We regard this as a narrow construction of the act. We think that it was intended to produce a uniform rule of procedure and to apply to all insurance companies incorporated by the laws of this State, and to all other insurance companies insuring lives or property within this State."

The case of The Fidelity Mutual Life Insurance Association *vs.* Ficklin, 74 Md., 172: 21 Atl. Reporter, 680, is also in point.

The court of civil appeals of Texas in Insurance Co. *vs.* Fields, 26 S. W., 280, announces the same doctrine in this language:

"The laws of New York (referring to the statute regulating forfeitures of life insurance) would apply to contracts made by insurance companies chartered under its laws,

whether the contracts were made in New York or in any other State in the Union."

To the same effect are—

Mullen *vs.* Insurance Co., 89 Tex., 259.
Goodwin *vs.* Insurance Co., 97 Ia., 226.
Insurance Co. *vs.* Pollard, 94 Va., 146.
Central Bank *vs.* Hume, 128 U. S., 195.

4.

THE LEGISLATIVE INTENT TO EMBRACE ALL POLICIES WITHIN THE ANTI-FORFEITURE ENACTMENT IS MADE MANIFEST BY THE ACT OF 1892.

The establishment of this proposition renders immaterial inquiry as to residence of parties or the place of execution or performance of contract, including any question as to the place at which premium payments are demandable.

The anti-forfeiture law of 1876, as amended by the act of 1877, was an enactment complete in itself—*i. e.*, it was not a part of but was enacted separately from the general insurance laws of the State. In 1892 the legislature of New York codified its various prior insurance enactments into one act in one chapter, and embodied in it the anti-forfeiture act of 1876 (with some modification). While it is true that the said act of 1876–'7 is enumerated in its schedule of laws repealed, it is also true that a subsequent section of the act (of 1892) continued the act of 1876–'7 in force so far as consistent with its substitute. This subsequent section, 292 (p. 2681), reads as follows:

"The provisions of this chapter, so far as they are substantially the same as those of laws existing on September 30, 1892, shall be constructed as a continuation of such laws, modified or amended according to the language employed in this chapter and not as new enactments." * * *

Section 291 saves rights "accruing, accrued, or acquired * * * prior to October 1, 1892, under or by virtue of the laws so repealed, but the same may be enjoyed, asserted, enforced, prosecuted, or inflicted as fully and to the same extent as if such laws had not been repealed." * * *

In their brief filed in support of the application for the writ of certiorari in this case counsel for the company contend that if either statute (1876–7 or 1892) were applicable, it would be the act of 1892, and they use the act of 1892 as the basis of their argument of the inapplicability of any statute. If it is correct to test the applicability of the anti-forfeiture acts by weighing the language of the act of 1892, certainly counsel will not object to looking at the *entire act* to ascertain the legislative intent as to any part of it. To do so is to demonstrate the applicability of the anti-forfeiture law to the policy at bar. Sections 1 and 37 of the act of 1892 are as follows:

"SEC. 1. This chapter shall be known as the insurance law, *and shall be applicable to all corporations authorized by law to make insurances.*

"SEC. 37. Any domestic insurance corporation, heretofore incorporated or extended under the provisions of any general or special law of the State, is hereby brought under all the provisions of this chapter relating to such corporation."

5.

By their petition for the writ and their brief in support thereof, counsel for the plaintiff in error raise a question whether the act of 1876 *as amended*, being of a general nature, applies to the plaintiff in error. In support of the negative thereof, counsel assert that plaintiff in error was created by a special charter. This assertion may or may not be correct, but certain it is that it finds no support in the record. In the complaint (par. 1) it is alleged "that the defendant is a corporation duly organized and existing under and by virtue of the *laws* of the State of New York

for the purpose of carrying on a life insurance business." This allegation is admitted by the answer, and it is twice (Rec., pp. 13, 15) affirmatively alleged in the answer "that the said defendant is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the *laws* of the State of New York for the purpose of carrying on a life insurance business."

There is nothing else in the record touching the question except the provision in the application bringing it under the "charter of the company" *and* "the laws of New York." So that whatever may be the truth of the matter, the record establishes the fact to be that plaintiff in error is not the creature of a private or special act.

If there is in existence such a special act or charter, the court does not take judicial notice of it, because judicial notice is confined to general laws. Private or special acts are to be alleged and proven like other *facts*.

Leland *vs.* Wilkinson, 6 Peters, 317.
Bank *vs.* Gruber, 87 Pa. St., 468.

But if it be true that the plaintiff in error was created by special charter, it is conceded by plaintiff in error that the legislature of New York might lawfully amend its charter in this way (brief in support of petition, p. 27). It is also conceded that such amendment may be effected without direct reference to the special act. It is also conceded that the amendment of the special act was effected if it is made clearly manifest by the general act that it was the legislative intent to include its specially chartered insurance corporations. We submit that such legislative intent is manifest from the language of the act of 1877, "No life insurance company doing business in the State of New York shall have power," etc. Such legislative intent is clearly manifest in the act of 1892 (secs. 1, 37, 92).

6.

THAT THE LEGISLATURE OF WASHINGTON HAS IMPOSED NO LIKE RESTRICTION UPON THE POWER OF INSURANCE COMPANIES DOES NOT ENLARGE THE POWERS OF CORPORATIONS OF OTHER STATES.

A corporation created by the State of New York and empowered to enter into certain contracts or classes of contracts only cannot lawfully contract otherwise anywhere. When it goes outside of New York it carries its impediment with it. If it goes into (say) the State of Missouri, the legislature of that State may impose additional restrictions upon its power to contract in Missouri, or it may not. If not, the corporation deals in Missouri just as in New York. If the legislature of Missouri lays added restrictions upon its powers or methods of contracting, it must conform thereto, and provisions in its contracts conflicting therewith are unenforceable. This we understand to be the doctrine of the Clements case, 140 U. S., 226.

Insurance Co. *vs.* Pollard, 94 Va., 146.
Fidelity Ins. Co. *vs.* Ficklin, 74 Md., 172.
Rue *vs.* R'y Co., 74 Tex., 474.
Canada So. R'y Co. *vs.* Gebhard, 109 U. S., 527–537.
Relfe *vs.* Rundle, 103 U. S., 222–225.

We apprehend that if Missouri imposed a restriction upon its contracting, compliance with which was forbidden by New York, it could only withdraw from Missouri.

Now, to apply the principle to the case at bar:

The plaintiff in error was forbidden by its creator, the legislature of New York, to enter into a contract of insurance terminable otherwise than in a certain manner and at a certain time (30 days after the happening of a certain event).

The statute imposed this time feature as well as the method upon the contracts of plaintiff in error, *however* they should be written or worded by the parties to them. If Mr. Sears had been a resident of New York State, counsel would not question but that the policy would have been subsisting at the time of his death. The company, being under such a disability, sends to Washington and solicits like business. The State of Washington permits it to do so. It would be most unreasonable to construe the permission to be intended as an enlargement of the powers of the company. Counsel for plaintiff in error would imply to the legislature of Washington an intent to authorize the foreign corporation to exceed the powers it has at its home and exercise in Washington powers or privileges forbidden it in New York, all for the purposes of working a disadvantage to its own citizens. This contention of counsel for plaintiff in error has not met with favor before the supreme court of Washington.

> Griesemer *vs.* Mutual Life Ins. Co. of N. Y., 10 Wash., 202–212.

The counsel for plaintiff in error in their brief call attention to the Washington statute relating to foreign corporations, and assert that the plaintiff in error had complied therewith prior to its transaction with Mr. Sears, but the record in this case does not support the assertion. The only reference in the pleadings to the matter is contained in paragraph II of the affirmative defenses (Rec., pp. 13–16), each of which reads as follows:

"That prior to and ever since the eighteenth day of May, 1891, the defendant has been engaged in carrying on its business of life insurance in the State of Washington, and has had during the said time and now has an agent representing it in said State, conducting its said business, and during said times had its soliciting insurance agents and medical examiners residing in said State of Washington,

and has complied with the laws of said State of Washington relating to foreign corporations transacting business therein."

II.

The Waiver of Statutory Notice Contained in the Policy is Ineffectual. To Hold Otherwise would be to Permit the Parties to Nullify the Statute.

According to the language of the policy (including the waiver provision), the premium for any given year was payable on May 18 of that year, and a failure to pay on that day put the insured in default and terminated the insurance.

According to the language of the statute, failure to pay on May 18 did *not* put the insured in default and did *not* terminate the contract. The insured was in default only if he failed to pay within thirty days after notice, and only *such* a default terminated the insurance. (That such is the effect of the statute is shown on the authority of the decisions of the New York court of appeals, *infra*, under the division III of the brief, to which we beg leave to refer the court.)

Which of these two inconsistent provisions controls?

The court of appeals of the State of New York, in the case of Baxter *vs.* Brooklyn Life Insurance Co., 119 N. Y., 450, in speaking of this particular statute in its relation to a policy issued by a New York life insurance company to and insuring the life of a resident of the State of Pennsylvania, uses this expression:

"This statute was a part of the contract in question and governed the rights and obligations of the parties, &c. * * * It is obvious that this statute, when imported into the contract, modified its conditions in very material respects." * * *

The same court, in De Frece *vs.* Insurance Co., 136 N. Y., 144, in speaking of the same statute in its relation to a life policy, says:

"The contract is to be read as if the act * * * had been literally incorporated into it."

The supreme court of New York, in Fischer *vs.* Ins. Co., 56 N. Y. Supp., 260, says:

"The conditions of the policy are controlled by the provisions of the statute," and * * * "the conditions of the policy are altered by the provisions of the statute."

The supreme court of the State of Washington, in speaking of the same point in Griesemer *vs.* Mutual Life Insurance Co., 10 Wash., 202–210, thus expresses the relation between the statute and the policy:

"It follows that the policy was governed by the statute."

The supreme court of California, in Osborne *vs.* Home Life Insurance Co., 123 Cal., 610; 56 Pac. Rep., 616, adopts both of the above-quoted expressions of the New York court of appeals.

The supreme court of Texas, in the case of Mullen *vs.* Mutual Life Insurance Co., 89 Tex., 259; 34 S. W. Rep., 605, in speaking of the same question, says:

"We think the provisions of the New York statute * * * entered into and became a part of the contract between the parties."

The supreme court of Michigan, in the case of Warner *vs.* Association, 100 Mich., 157, in speaking of the same statute and its relation to a life policy to which it was applicable, says:

"These statutory provisions form a part of the contract of insurance and cannot be waived by the parties."

The United States circuit court of appeals for the second circuit, sitting in the State of New York, in the case of Hicks *vs.* Insurance Co., 60 Fed. Rep., 690; 9 C. C. A., 215, in discussing the relation of this statute to such a policy, uses this language:

"The policies * * * were, of course, dominated by the statute * * * as completely as though the statutory conditions had been explicitly incorporated in them."

The United States circuit court of appeals for the ninth circuit, in the case of Nixon *vs.* Insurance Co., 81 Fed. Rep., 802; 26 C. C. A., 620, and in Equitable Life Ass'n *vs.* Trimble, 83 Fed. Rep., 85; 27 C. C. A., 404, says of the relation between that statute and such a policy:

"The statute is mandatory and controls the contract."

The United States circuit court of appeals for the sixth circuit, in the case of Rosenplanter *vs.* Provident Society, 96 Fed. Rep., 721; —C. C. A., —, in considering the relation between the New York statute and a like life policy of insurance, speak of the policy as being "dominated by the statute."

So that it may be regarded as so far thoroughly established that if the statute is to be regarded as a part of the contract it is the controlling part of it; and, on the other hand, if it is to be said that the statute is not a part of the contract between the parties, yet it is equally true that by a will superior to that of the contracting parties their contract is dominated and overruled by the statute at every point of conflict between them.

It has been repeatedly decided that the waiver provision is ineffectual.

The supreme court of California states its conclusion thereon in the following language:

"It would seem, however, that the New York statute was intended to cut deeper, and as a matter of public policy to

inhibit forfeitures by life insurance companies, except by the method therein provided.

'No life insurance company doing business in this State shall have power to declare forfeited or lapsed any policy * * * by reason of non-payment of premium, etc., except as therein provided.'

The statute is a limitation on the power of the company to do a specified thing, except under prescribed conditions. That which a corporation has not the power to do, if attempted to be done by it, is *ultra vires* and void.

Admit that Griffith attempted to waive all notice of non-payment of premiums, if the power was lacking in the corporation to declare a forfeiture in consequence thereof, it is not perceived how it can be done. The very idea of a waiver involves the right of the contracting parties to make and accept such waiver—consent never gives jurisdiction not otherwise possessed of the subject-matter to a court, for the reason that it lacks the power to adjudicate such subject-matter, except as conferred by law.

A corporation being the creature of the law must confine its functions to the limits prescribed for its action, and if the law expressly inhibits it from doing a given thing it is powerless to do that thing, and, if it can do it only in a given manner, the prescribed method becomes the measure of its power.

We are not met with any suggestion that the statute in question is violative of any chartered right of the defendant, and, in the absence of a showing to the contrary, must assume the New York statute to be in consonance with its constitutional and chartered rights.

The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away.

The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them."

Griffith *vs.* New York Life Ins. Co., 101 Cal., 627, on pp. 641, '2.

The supreme court of Michigan announced the same result in construing a policy of insurance made in New York and subject to a similar law made in reference to assessment societies passed in 1892. It uses the following language:

"The contract of insurance was made in the State of New York, and is governed by the laws of that State. * * * The notice sent to the insured, in the present case, did not comply with this statutory provision. The design of the statute is apparent. A policy in a regular life company fixes both the time of payment of premium and the amount thereof; yet that same statute provides that no life insurance company can declare forfeited or lapsed any policy by reason of the non-payment of any premium without notice, and prescribes what such notice must contain. It further provides that, in case payment is made within the life of the notice, it shall be taken to be in full compliance with the requirements of the policy, anything therein contained to the contrary notwithstanding. *These statutory provisions form a part of the contract of insurance and cannot be waived by the parties.* In their absence the parties are bound by the stipulations in the contract. Fixed premiums, payable bimonthly or otherwise, are incidents of regular life policies. Assessments are essential incidents of co-operative associations organized under this statute, and notice through some medium is requisite. The statute relating to assessment companies does not undertake to fix the time of the notice, but it does fix and determine what the notice must contain. The statute contemplates that through these notices the policy-holder shall be advised of the cause and purpose of the assessments; and the statute cannot be avoided by a condition attached to the policy, that, in case no notice is given, the insured shall be required to forward to the association an amount equal to the previous assessment. In the present case the association did give notice of the assessment, which was a sum greater in amount than the previous assessment; and, not having given such notice in the manner prescribed by the statute, it cannot be allowed to declare a forfeiture of the policy by reason of its non-payment."

Warner *vs.* Life Association, 100 Mich., 157, on p. 159-160.

In Insurance Co. *vs.* Pollard, 94 Va., 146, the court says:

"It (the statute) is therefore as much a part of every contract of life insurance governed by the laws of the State of Ohio and made after that statute was passed as if incorporated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws, and no waiver of the parties nor stipulations in the contract can change the law."

In this case the insured resided in Virginia, where the contract was consummated. The insurer was an Ohio corporation. The parties stipulated that the contract was subject to the laws of Ohio.

In Insurance Co. *vs.* Ficklin, *supra*, the court (on the rehearing) says:

"The Pennsylvania statute enacted that whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture. * * * In other words, the statute is to be entirely overthrown and set aside, and the insurance company, under the guise of an agreement, is to acquire the power to accomplish the very result which the statute intended to prevent. Statutes would be very ineffective if they could be defeated in this way. * * * Neither can an agreement be valid which gives an effect to a warranty which is in defiance of the statute. The legislature enacted a rule for the regulation of the contracts of insurance companies, which is a matter of public interest and concern. The operation of the rule does not depend on the agreement of these corporations to adopt it as a basis of their contracts; on the contrary, the rule prescribes the scope and effect of policies of insurance, and authoritatively determines the duties and obligations which arise from them. * * * The contract of insurance must be made in subordination to the statute, and must have the legal effect which the statute attributes to it, and none other. Whatever form of words may be used, the legal effect of the warranty must be such as the statute impresses upon it. It was the intention of the legislature to prevent insurance companies from for-

feiting policies by means of warranties, as they had been previously construed, and to enforce the new construction set forth in the statute. These corporations, manifestly, have not the legal capacity to made a contract which should give a construction to a warranty in opposition to that which the law has established, and of course they cannot by virtue of any agreement acquire the competency to do that which the law forbids. * * * The materiality of the statement is the indispensable condition on which the invalidity of the policy depends, and it must be established by proof. *It is not competent to substitute for this proof an agreement of the parties that it should be considered material.* Neither can an agreement be valid which gives an effect to a warranty which is in defiance of the statute. The legislature enacted a rule for the regulation of the contracts of insurance companies, which is a matter of public interest and concern."

In the case last cited the insurer was a Pennsylvania corporation; the contract was consummated in Baltimore; the insured resided in Virginia; the contract was silent as to place of performance, and contained no stipulation making it subject to the laws of Pennsylvania.

To the same effect are the following cases:

Insurance Co. *vs.* Nixon, 26 C. C. A., 620; 81 Fed., 796.
Insurance Co. *vs.* Trimble, 27 C. C. A., 404; 83 Fed., 85.
Osborne *vs.* Ins. Co., 123 Cal., 610; 56 Pac. Rep., 616.
Mullen *vs.* Ins. Co., 89 Texas, 259; 34 S. W. Rep., 605.
Hermany *vs.* Ins. Co., 151 Pa. St., 17.
Reilly *vs.* Ins. Co., 43 Wis., 449.
Insurance Co. *vs.* Smith, Tex. C. C. A.; 41 S. W. Rep., 680.
White *vs.* Ins. Co., 4 Dillon, 177.
Emery *vs.* Ins. Co., 52 Me., 322.
Ins. Co. *vs.* Rudwig, 80 Ky., 223.
Chamberlain *vs.* Ins. Co., 55 N. H., 249.
Holmes *vs.* Charter Oak Ins. Co., 131 Mass., 64.
White *vs.* Ins. Co., 163 Mass., 108.

It is respectfully submitted that discussion of the question is concluded by the case of Wall *vs.* Insurance Co., 32 Fed., 273, and 140 U. S., 226. In this case the company, a New York corporation, issued a life policy to Wall, a resident of Missouri. A Missouri statute provided that after the payment of two annual premiums default in payment of premium should not terminate the policy but the policy should continue in force for so long a time as four-fifths of the net reserve on the policy taken as a single premium would carry it. The application contained a waiver of the statutory provision. The court (circuit and supreme) held that the Missouri statute was applicable to the policy. The question then arose as to the effect of the waiver.

Brewer, J., held (at circuit):

"Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases, absolute and universal, because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive—in fact, no words of negation in any direction—yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce (Railway Co. *vs.* Peavy, 29 Kan., 169). The legislature has by this language declared a rule in respect to forfeitures in life-insurance policies; it has thus established the policy which it believes should obtain in this State, and, though sitting on the Federal bench, it is my duty to administer the laws of this State in the spirit in which they were enacted, and to uphold both their letter and their spirit."

The case and question subsequently came before this court, and it was held:

"It follows that the insertion in the policy of a provision for a different rule of computation from that prescribed by the statute in case of a default in the payment of a premium

after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

The insurer in that (the Clements) case was a New York corporation. The New York statute permitted forfeiture of the policy for non-payment of premium only upon a certain contingency. The Missouri statute imposed a further restriction upon forfeiture. This court held that the waiver in the application of "all right * * * required by a statute of any State * * *" was ineffectual. The language of the New York statute, "no policy of insurance on life * * * shall after payment upon it of two full annual premiums become forfeited or void by reason of the non-payment of premium thereon, but shall be subject to the following rules and commutations," is at least as positive as that of the Missouri statute. Is not, then, the ruling in the Clements case a direct holding that the waiver in this policy is ineffectual?

Overruled Cases Cited by Plaintiff in Error on Question of Waiver of the Statute of New York.

In the Phinney case counsel for the plaintiff in error cited certain authorities in support of their claim that the waiver clause of the policy overrides the statute. Certain of them have since been overruled.

The case of Insurance Co. *vs.* Curray, 13 Bush, 312, was distinctly overruled in the case of Ins. Co. *vs.* Rudwig, 80 Ky., 223, on page 235, as follows:

"And when parties have entered into an insurance contract since the adoption of this statute they must be held as contracting with reference to the statutory provision, and,

we might add, subject to a like rule, recognized by this court regardless of the statute, and therefore that portion of the opinion in the case of The Farmers' and Drovers' Bank against Curray, expressing a contrary view, is overruled."

The cases of Desmazes *vs.* Ins. Co., 7 Fed., 529, and Caffery *vs.* Ins. Co., 27 Fed., 25, both relating to the law of Massachusetts passed in 1861 and holding to the effect that that statute could be waived, are disapproved, the first named specifically and the latter on principle, in the case of Holmes *vs.* Ins. Co., 131 Mass., at page 64. They are cited also with disapproval by Judge Dillon in the case of White *vs.* Ins. Co., 4 Dill., 177; also in the cases of Griffith *vs.* Ins. Co., 101 Cal., 627, and Ins. Co. *vs.* Rudwig, 80 Ky., 223, on the ground that they were contrary to the great weight of authority. If they are, as claimed by plaintiff in error, they are surely contrary in principle to the case of Clements *vs.* Ins. Co., 140 U. S., 226. It is to be noted, however, that in the Desmazes case the alleged waiver took place subsequent to the delivery of the policy, and *was supported by a new consideration*, viz., the acceptance of a new (paid-up) policy in lieu of the old. In the Caffery case the effect of the holding is that in a forfeitable policy the anti-forfeiture law of Massachusetts could not be waived, but could be waived by the parties adopting in the first instance a policy non-forfeitable in any event. The other cases cited on this proposition are so clearly not in point that we shall not discuss them.

If this court should be of the opinion that upon the enactment of the act of 1892 all outstanding policies which were within its terms came under it, and that this policy is controlled by it, there is to be found in the act another implication of the legislative intent to forbid a waiver of the notice. By the act there are two privileges of the insured forced upon the insurer. One is the extended insurance privilege, the other the privilege to pay a passed premium

after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

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If this court should be of the opinion that upon the enactment of the act of 1892 all outstanding policies which were within its terms came under it, and that this policy is controlled by it, there is to be found in the act another implication of the legislative intent to forbid a waiver of the notice. By the act there are two privileges of the insured forced upon the insurer. One is the extended insurance privilege, the other the privilege to pay a passed premium

within thirty days after notice with like effect as if paid at the due date. Section 88 of the act creates the former, section 92 the latter privilege. By section 88 a waiver of the former is permitted, viz:

"This section shall not apply to any case where the provisions of this section are specifically waived in the application, and notice of such waiver is written or printed in red ink on the margin of the face of the policy when issued."

The implication is that the legislature did not mean to permit a waiver of the other privilege.

III.

Estoppel in Pais.

It is urged by the plaintiff in error that the matters set up in paragraph 6 of the affirmative defense of its answer (Record, p. 18) constitute a complete defense to the action upon the policy, and that the action of the circuit court in sustaining the demurrer thereto was error. This contention must rest upon the theory that the facts therein alleged are sufficient to constitute an estoppel *in pais* against the plaintiff below.

In the discussion of this question it is proper to assume that the statute of New York appliés to the policy in suit; that there is in the case no departure from law to law, or at all; that tender prior to the commencement of the action was unnecessary; that the New York act of 1897 is inapplicable, and that in all respects the conditions of the policy as modified by the statute were performed by the insured. In brief, that unless this be a defense, the plaintiff was entitled to the judgment.

Having narrowed down the question to the precise point under discussion, it is proper to consider again the facts in

the case in the relation which they bear to this affirmative defense.

The Facts.

It is admitted by the pleadings that on May 18, 1891, the insurance company received from Sears $491, and in consideration of it issued to him the policy of insurance which is involved in the pending action. By this contract of insurance the company agreed to pay his executrix the sum of ten thousand dollars upon acceptance of satisfactory proofs of his death. Sears paid the first and second annual premiums—that is to say, the premiums payable May 18, 1891 and 1892. He failed to make payment of any subsequent annual premium. He died March 30, 1898. The policy provided that on the 18th day of May of each year following the year 1891 Sears should pay the sum of $491. The New York statute which was in force at the time the policy was issued (statute of 1877) provided that the policy might not be declared forfeited or lapsed by reason of non-payment of any annual premium, unless a notice stating when the premium should fall due, and that if not paid the policy will become forfeited and void, be mailed at least 30 and not more than 60 days prior to the due date of the premium (or a like notice should be given after default). The statute required such notice to state that *unless the premium be paid within* 30 *days after the mailing* of the notice the policy will become forfeited. The statute further provided that in case the payment demanded by the notice be made within the said 30 days such payment should be a *full compliance with the requirements of the policy* in respect of the payment of the premium, anything contained in the policy to the *contrary notwithstanding*, and the policy may not in any case *be* forfeited or declared forfeited or lapsed until the expiration of 30 days after the mailing of the notice. The statute of 1892, which went into effect in October, 1892, is a re-enactment of the statute of 1877, above referred to, except that it

required the notice to be mailed at least 15 and not more than 45 days prior to the due date of the premium. It did away with the notice which the statute of 1877 provided might follow a failure to pay a premium at a due date. The statute of 1892 contains this provision:

"If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be *in full compliance* with the requirements of the *policy* in respect to the time of such payment, and no such policy shall in any case *be* forfeited or declared forfeited or lapsed until the expiration of 30 days after the mailing of such notice."

No notice of any kind was mailed to Sears in the years 1893, 1894, 1895, 1896, or 1897. He died March 30, 1898.

The matter relied upon by the petitioner as constituting an estoppel is as follows:

"That subsequent to the failure of the said Stephen P. Sears to make payment of the said annual premium falling due on said policy, May 18, 1893, and subsequent to the lapsing of said policy for failure to make said payment, and after the said Stephen P. Sears was fully informed and knew that said policy had been by it declared lapsed and void for non-payment of premium, this defendant, through its agents, applied to said Stephen P. Sears to make restoration of said policy by making payment of said defaulted premium and having the said policy restored to force, but that said Stephen P. Sears refused to make such payment and refused longer to continue said policy or make any further payments thereon, and then and there elected to have the same terminated, and this defendant, relying upon the said election and determination of said Stephen P. Sears, at all times subsequent thereto treated said policy as lapsed, abandoned and terminated, and relying upon the said conduct of said Sears abstained from taking any further action or step in relation to said policy, by way of notice or otherwise, in order to effect the cancellation and termination thereof."

Argument.

While it is contended by defendant in error that it is the statute of 1877 which controls the case, yet in the discussion of this question it would be aside from the issue to discuss whether or not the statute of 1892 or that of 1877 controls the discussion, for neither statute was complied with by the petitioner, and it is equally immaterial to consider or determine whether the New York statute is to be said to be a part of the contract or incorporated in it or how the connection between the two should be called or classified. The courts, while using varying forms of expression, ultimately agree that when the New York statute applies, it *dominates* the policy.

The court of appeals of the State of New York, in the case of Baxter *vs.* Brooklyn Life Insurance Co., 119 N. Y., 450, in speaking of this particular statute in its relation to a policy issued by a New York life insurance company to and insuring the life of a resident of the State of Pennsylvania, uses this expression:

"This statute was a part of the contract in question and governed the rights and obligations of the parties. * * *
"It is obvious that this statute, when imported into the contract, modified its conditions in very material respects." * * *

The same court, in De Frece *vs.* Insurance Co., 136 N. Y., 144, in speaking of the same statute in its relation to a life policy, says:

"The contract is to be read as if the act * * * had been literally incorporated into it."

The supreme court of New York in Fischer *vs.* Ins. Co., 56 N. Y. Supp., 260, says:

"The conditions of the policy are controlled by the provisions of the statute" and "the conditions of the policy are altered by the provisions of the statute."

The supreme court of the State of Washington, in speaking of the same point, in Griesemer *vs.* Mutual Life Insurance Co., 10 Wash., 202–210, thus expresses the relation between the statute and the policy:

"It follows that the policy was governed by the statute."

The supreme court of California, in Osborne *vs.* Home Life Insurance Co., 123 Cal., 610; 56 Pac. Rep., 616, adopts both of the above-quoted expressions of the New York court of appeals.

The supreme court of Texas, in the case of Mullen *vs.* Mutual Life Insurance Co., 89 Tex., 259; 34 S. W. Rep., 605, in speaking of the same question, says:

"We think the provisions of the New York statute * * * entered into and became a part of the contract between the parties."

The supreme court of Michigan, in the case of Warner *vs.* Insurance Co., 100 Mich., 157, in speaking of the same statute and its relation to a life policy to which it was applicable, says:

"These statutory provisions form a part of the contract of insurance and cannot be waived by the parties."

The United States circuit court of appeals for the second circuit, sitting in the State of New York, in the case of Hicks *vs.* Insurance Co., 60 Fed. Rep., 690; 9 C. C. A., 215, in discussing the relation of this statute to such a policy, uses this language:

"The policies * * * were, of course, dominated by the statute * * * as completely as though the statutory conditions had been explicitly incorporated in them."

The United States circuit court of appeals for the ninth circuit in the case of Nixon *vs.* Insurance Co., 81 Fed. Rep., 802, 26 C. C. A., 620, and in Equitable Life Ass'n *vs.* Trimble, 83

Fed. Rep., 85, 27 C. C. A., 404, says of the relation between that statute and such a policy:

"The statute is mandatory and controls the contract."

The United States circuit court of appeals for the sixth circuit in the case of Rosenplanter *vs.* Provident Society, 96 Fed. Rep., 721, — C. C. A., —, in considering the relation between the New York statute and a like life policy of insurance, speaks of the policy as being "dominated by the statute."

So that it may be regarded as so far thoroughly established that if the statute is to be regarded as a part of the contract, it is the controlling part of it; and, on the other hand, if it is to be said that the statute is not a part of the contract between the parties, yet it is equally true that by a will superior to that of the contracting parties their contract is dominated and overruled by the statute at every point of conflict between them.

In order to appreciate the force of the facts constituting the alleged estoppel *in pais*, it is necessary to understand the rights of the parties at the time those facts transpired. The estoppel *in pais* is based upon an alleged conversation which took place some time after May, 1893, and prior to the death of Sears (which occurred on March 30, 1898), between an agent of the insurance company and Sears. What were the rights of Sears at the instant of time when this conversation was initiated? And what at the same moment were the rights of the company? It is necessary to first solve these inquiries from the record in this case, in order to reach a conclusion as to the effect upon those rights which that conversation and the events which followed it have; in other words, we should first ascertain the rights of the parties, and, weighing those rights, then test by them the sufficiency of the facts alleged as an estoppel.

On the 18th day of May, 1892, Sears paid the company the second annual premium. This payment had the effect

of insuring his life for the period of at least one year. This no one will dispute. During that period of one year his right under the policy was a valuable property right. If by that payment his policy became and remained a subsisting contract of insurance for a longer period than one year, it remained a valuable property right for such longer period. It does not appear from the allegations of the affirmative defense whether this conversation took place in the year 1893 (save that it does appear that it did not occur prior to May 18, 1893), nor whether it occurred in the year 1894, or in the year 1895, or in the year 1896, or in the year 1897, or in the year 1898 (save that it does appear that it must have occurred prior to March 30, 1898, that being the date of the death of Sears). But we claim that it does appear that whenever it occurred it was at a time when Sears' policy was a valid, subsisting contract of insurance; and we claim further that when it occurred Sears was not in default, was under no obligation to pay any premium or sum of money whatever to the company, so that, if he had died at the moment of time when the agent approached him for the purpose of the conversation, his executrix would have been entitled to receive from the company the sum of $10,000, less the deferred annual premium or premiums.

It is the contention of the defendant in error that upon the payment of the 1892 premium the policy was continued in force for a minimum period of one year. It was continued in force for the period of one year and until a statutory notice should be mailed, and for thirty days thereafter. The statutory notice not having been mailed during any subsequent year, the policy remained a valid, subsisting contract of insurance up to the time of the death of Sears. In the brief filed by the petitioner in support of the application for a writ of certiorari (which is the only statement by the plaintiff in error of its contention in this case to which we have access at this writing) it is claimed that the policy became forfeited by the failure to pay the 1893 premium,

and that the statute of New York forbade only the *declaration* of the forfeiture. It is contended, on the contrary, on behalf of the defendant in error, that the statute changed the default period from that named in the policy to another fixed by the statute. The insured did not suffer default by not paying on the several annual due dates named in the policy, but could be only in default if he failed to pay an annual premium within thirty days after the mailing of a statutory notice. This contention is based upon the language of the statute itself. (In the discussion of this question, while contending all the while that the statute of 1877 governs, we shall use the statute of 1892, since counsel for the petitioner seem to prefer that statute). The statute reads:

"If the payment demanded by such notice shall be made within its (the) time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment, and no such policy shall in any case be forfeited or lapsed until the expiration of 30 days after the mailing of such notice."

The effect which we claim from the statute has been given to the statute by the highest court of the State of New York, and we assume that it is only necessary to convince this court that the New York court of appeals has given that construction to that provision of the New York statute, and, if we do so, this court will unhesitatingly follow that decision. We undertake to do so, and to reinforce it by showing that the same construction has been placed upon that statute by every one of the United States circuit courts of appeal to whom the question has been presented, as well as by every State court which has passed upon it.

The attention of the court is especially directed to the decision of the court of appeals of New York in the case of Baxter *vs.* Brooklyn Life Insurance Co., 119 N. Y., 450 (the court in that case had before it the New York statute of 1877, the statute which was in force at the time the Sears

policy was issued and which we claim is the controlling statute), the language of which, bearing upon the point under consideration and paralleling the paragraph above quoted from the act of 1892, is as follows:

"In case the payment demanded by such notice shall be made within the 30 days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything contained therein to the contrary notwithstanding; that no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of 30 days after the mailing of such notice."

The Baxter Case.

It was an action upon a life-insurance policy. The complaint alleged the delivery of the policy, the death of the insured, the presentation to the company of satisfactory proofs of death, its refusal to pay, and that the insured had made the payments of the premiums according to his agreement with the company. No issue was made by the company upon any of the allegations of the complaint except the last, which it denied, and alleged affirmatively that a certain premium which came due before death had not been paid. On the trial the plaintiff put in evidence the policy and rested. The defendant moved a nonsuit on the ground that the insured had failed to comply with the conditions of the policy by neglecting to pay said premium. The motion was denied and judgment went for the plaintiff. The court holds that the production of the policy on the trial proved the payment of the first premium, "but it was essential to the maintenance of plaintiff's cause of action to show that the policy was a valid and subsisting contract at the time of the death of the insured. The policy itself contained a stipulation that it was a contract made and executed in the State of New York and construed only according to the laws of that State. Aside

from this provision of the policy, and under general rules of law, this contract was subject to the terms and conditions expressed in chapter 341 of the laws of 1876, as amended by chapter 321 of the laws of 1877. This statute was a part of the contract in question, and governed the rights and obligations of the parties precisely the same and to the same extent as if all its terms and conditions had been actually incorporated into the policy. The promise of the defendant was to pay to the beneficiary named the sum of three thousand dollars upon the death of the insured, in case that event occurred during the continuance of the contract. It therefore becomes important to inquire whether the policy in question was in force at the time of the death of the insured, on the 7th day of September, 1884. If upon that day it was a valid subsisting contract, notwithstanding the failure to pay the premium due on the preceding 24th day of August, then the very contingency upon which the defendant agreed to pay the amount of the insurance had happened."

The court here reviews the provisions of the statute and proceeds:

"There was no proof given at the trial by either party to show whether this notice was served or not. It is obvious that this statute when imported into the contract modified its conditions in very material respects. The duration and validity of the policy is not, then, dependent upon payment of the premium on the day named therein, but upon payment within thirty days after the notice has been given. The condition upon which the policy can be forfeited, or in any way impaired as a subsisting contract of insurance, is a failure on the part of the insured to pay the premium *within thirty days after notice*. The complaint alleges that the insured, up to the time of his death, made the payments on the policy as agreed with the defendant. That he actually paid the premium necessary to keep the policy in life until the 24th of August prior to his death was established and admitted. It was not necessary to prove that he also paid the premium on the 24th of August, because the contract

was not impaired by a failure to pay on that day, but by a failure to pay within thirty days after the defendant had served the statutory notice. The statute prescribes this notice as a necessary condition of forfeiture; and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium. *In the absence of proof on the part of the defendant as to the service of the notice, this allegation of the complaint was sufficiently established within the meaning of the contract as evidenced by the policy and the statute when read together.* Before the defendant could raise any question in regard to the non-payment of the August premium it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential in order to put the insured in default or to raise any point based on his omission to pay the last quarterly premium. *It must therefore be assumed, in the absence of such notice, that the policy in question was in full force at the death of the insured;* and, even if the payment of the last premium was omitted, the obligation and promise of the defendant to pay upon death during the life of the policy was unimpaired."

The decision in the Baxter case has been approved by subsequent decisions of the court of appeals of New York. It was expressly reaffirmed on this point in the subsequent case of De Frece *vs.* Insurance Co., 136 N. Y., 144, in which the court says (page 151):

"The plaintiff was not bound to allege the proof of payment of the annual premiums when due. The contract is to be read as if the act * * * had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after due service of the notice required by law."

The decision in the Baxter case upon this point is in line with the prior decision of the same court in the case of Phelan *vs.* Insurance Co., 113 N. Y., 147. It is followed by the supreme court of New York in the case of Schad *vs.*

Insurance Co., 42 N. Y. Supp., 314, in which the following language is used:

"In this view of the case it is not necessary to consider the other questions raised. If the proper notice was not given, the assured at his death was not in default, and the defendant has no defense to the action."

The doctrine of the Baxter case upon this point has been followed by the supreme court of the State of New York in the recent case of Fischer *vs.* Metropolitan Life Insurance Co., 56 N. Y. Supp., 260, in which the court says:

"The effect of the statute was that, after the policy had once been issued, no act of the insured, by way of omission to pay the premium, could or does work a forfeiture of the policy. So far as it was concerned, the contract was a permanent one until some act of the defendant had been done by way of putting an end to it. Therefore, when any one entitled to sue upon it had occasion to bring an action, he was not compelled, as a condition of making out his cause of action, to show that the payment of premiums had continued after the policy had once taken effect, because by the express terms of the statute the policy remained a valid instrument between the parties until, after a default in the payment of the premiums, the company had served the notice and taken the action which was prescribed by the statute. * * * The allegation of the complaint, therefore, that the policy was an existing policy, was sufficiently established by the policy when read in the light of the statute. Before the defendant could raise any question in regard to the non-payment of the premium, it was necessary to show that it had complied with the statute by serving the notice, as this step was essential to put the assured in default or to raise any point based on his omission to pay the premium. * * * That the policy was therefore an existing contract between the parties was admitted by the pleadings, and the effect of the statute was that that contract, which had taken effect between the parties, remained a good and sufficient contract until a notice had been served requiring the payment of the premiums."

"No policy can be declared *or treated* as lapsed or forfeited until thirty days after notice to the policy-holder."

Stokes *vs.* Amerman, 121 N. Y., 337–343.

The doctrine of the Baxter case has been adopted by the circuit court of appeals for the ninth circuit in the following cases:

Provident Co. *vs.* Nixon, 73 Fed., 144–148.

New York Life Ins. Co. *vs.* Dingley, 35 C. C. A., 245; 93 Fed. Rep., 153.

(In this case the policy was issued in 1894, and therefore came under the act of 1892.)

Ins. Co. *vs.* Nixon, 26 C. C. A., 620; 81 Fed. Rep., 796.

Ins. Co. *vs.* Trimble, 27 C. C. A., 404; 83 Fed. Rep., 85.

Also the case of Mutual Life Insurance Co. *vs.* Dingley (not reported), in which case three of the policies involved were issued before and one after the enactment of the act of 1892. From the opinion (which we have in manuscript) we quote the following:

"It was no answer to the case made in the complaint to say that the insured had failed to pay premiums, and that thereby his policies were forfeited, for the law attaches no such result to that default."

The doctrine of the Baxter case is also adopted by the circuit court of appeals of the second circuit in the case of Hicks *vs.* The National Life Ins. Co., 9 C. C. A., 215; 60 Fed., 690; also by the circuit court of appeals of the sixth circuit in Rosenplanter *vs.* Provident Society, — C. C. A., —; 96 Fed. Rep., 721, from which the following is quoted:

"The effect of the prohibition against declaring a forfeiture of the interest of the assured under the contract was to keep the policy alive as a valid subsisting insurance, notwithstanding the stipulation of the parties to the contrary. The

duration of the policy, so long as it was dominated by statute, was not dependent upon the payment of the premium on the day named therein, but upon payment within thirty days after the statutory notice should be given. The only way in which the policy could be terminated under the statute was by the failure of the insured to pay his premium upon notice 'mailed' thirty days before the premium was due or by notice of forfeiture and demand for payment within thirty days after mailing such notice."

The aforesaid doctrine of the Baxter case is adopted bodily by the supreme court of California in the case of Osborne *vs.* Home Life Insurance Co., 123 Cal., 610; 56 Pac. Rep., 616. It is in effect approved by the earlier California case of Griffith *vs.* Ins. Co., 101 Cal., 627.

Also by the supreme court of Texas in the case of Mullen *vs.* Mutual Life Ins. Co., *supra*, from the opinion in which case the following quotation is taken:

"In construing this statute the courts of New York have held that no forfeiture of a life-insurance policy can occur unless the notice provided for in the statute has been given, and that the burden of showing such notice is on the insurance company, and that the insured is not considered in default of payment until at least thirty days after such notice is given, and although the insured may in fact have failed to make any number of payments, he must not be regarded, in the light of the statute, as in default or as having failed to meet his obligation until thirty days after such notice is given. Viewed in the light of this construction, which this court must accept, it would seem that the plaintiff in error only alleged in his petition what was legally true, and only what was necessary to show a rightful recovery. While it is true that he failed to pay two of the matured premiums before his wife's death, yet in the absence of notice such failure had no effect upon his legal rights in the premises, and did not constitute a breach of his obligation to pay premiums."

The supreme court of Michigan, in the case of Warner *vs.* National Life Association, *supra*, adopts the doctrine of the Baxter case upon this point.

By these decisions the law is firmly established that the duration and validity of the Sears policy was not dependent upon the payment of the premium annually on May 18, but upon the payment within thirty days after the mailing of the statutory notice, and that the condition upon which the policy could be forfeited or in any way impaired as a subsisting contract of insurance was the failure of Sears to pay the premium within thirty days after notice, and it appearing by the case made that no such notice was ever given, therefore no default occurred, and the insurance was valid and subsisting at the time of the death of Sears unless a case of equitable estoppel against his executrix is made out by the answer; so that at the time (whenever it was) that the company's agent approached Sears, as alleged in the affirmative answer, Sears was possessed of a valid subsisting policy of insurance. He was not in default. He had fully performed all the conditions of the contract which the law required him to perform. It was not at that time in the power of the company to terminate that contract. It could at the next ensuing due date after that conversation give the statutory notice, but the statutory notice would not have terminated the contract unless Sears failed to pay the required premium within thirty days after the mailing of that notice. If this conversation occurred in 1897, the situation was not different than if the conversation had occurred between, say, June 1, 1892, and January 1, 1893. If it had occurred during the last-named period it would have occurred at the time when Sears was not in default, because he had paid the premium covering to May 18, 1893. If it occurred during the first-named period he was not in default, although he had not paid any premium subsequent to that paid in 1892. In the brief filed in support of the petition for a writ of certiorari

it is stated as a fact, as well as by way of argument, that the transaction set forth in the affirmative answer was an agreement between Sears and the company, represented by the agent, that the policy should terminate. The allegations of the affirmative answer do not support such a statement or argument; but if it were otherwise, it is respectfully submitted that the agreement to terminate was *nudum pactum* for want of a consideration. Let us suppose that such an agreement might have been entered into during the last of the above-named periods. At that time Sears had a valid subsisting policy, for which he had paid the current premium, covering and extending beyond the time of the agreement. The agent came to him, and they agreed that the insurance should terminate. What consideration would there be to support the agreement? If Sears had died the day following it, would it be contended that his executrix could not have enforced the policy? The same conclusion must follow if the agreement took place during the first-named period, say during 1894 or subsequently, when a premium or premiums had been passed without payment; nevertheless the policy was a valid and subsisting contract. It was a valuable property right. There was no debt owing from Sears to the company for two reasons:

1st. The obligation to pay the annual premiums is not an enforcible demand in favor of the insurance company (Goodwin *vs.* Mass. Life Ins. Co., 73 N. Y., 480); and 2d, if it were, it was not yet due or payable, and Sears was not in default in the payment of it, and could not be until the expiration of 30 days after statutory notice.

This point has been expressly so decided by the circuit court of appeals of the ninth circuit in the case of Mutual Life Ins. Co. *vs.* Dingley (not yet reported), above referred to, from the manuscript opinion of the court, in which case we take the following:

"It is contended that the court erred in sustaining the demurrer to the affirmative matter of the answer, which alleged that the insured informed the insurance company that he recognized the contracts of insurance were lapsed, and that he had refused to continue his policies, and that it was then mutually agreed between the contracting parties that the policies were lapsed and terminated. It is not asserted that the contracts of insurance were declared forfeited by an instrument under seal, or that any consideration passed to the insured for the cancellation thereof. The matters so pleaded evidently rested in parol."

Nothing can be treated as a consideration that is not intended as such by the parties.

Fire Ins. Ass'n *vs.* Wickham, 141 U. S., 564.

So that if the matter rested solely upon such an agreement, it follows that the policy was subsisting and enforcible at the time of Sears' death. It is a fair test of this proposition to suppose the case to be that the agent came to Sears and he and Sears agreed together that the insurance was at an end, no consideration passed, and the policy itself was not surrendered. If Sears' death had occurred immediately, would not the policy have been subsisting and enforcible, notwithstanding the agreement? The answer must be yes. Therefore if enforcible then, it would be enforcible the next day, or the next week, or the next year, *unless something intervened which would supply the place of a consideration.* It is claimed on behalf of the plaintiff in error that that something did intervene and it was an estoppel, to wit, that, relying upon what took place between the agent and Sears at that time (whenever it was), the company withheld a statutory notice or notices. There are several complete answers to this claim.

FIRST.

It does not follow that if the company had not withheld the notice, but had given it, the policy would not have been still in force at the time of Sears' death; for if subsequently a statutory notice had been given, the notice itself would not have terminated the policy. Sears would have still had the right to comply with the terms of the notice. Upon receipt of such a notice he might have changed his mind from the intention he had expressed to the agent and have paid the premium. The position of the company was not changed to its injury, for the same result is reached by the judgment in this case (by way of deduction of passed premiums with interest) as might have followed the giving of the notice had the company not relied upon the statement made by Sears to the agent. The petitioner, by its plea of estoppel, in effect says: If Mr. Sears had not made this statement to our agent, we possibly would have given a statutory notice at the next or some subsequent due date (if one occurred prior to the death), and Mr. Sears would not have complied with it, because he said that he would not, and *if* Mr. Sears had not made the statement to our agent, and *if* he should not have paid, the policy would have been terminated; therefore Mrs. Sears is estopped to deny that the policy is terminated.

There are too many "ifs" in the proposition to constitute a good estoppel, and this brings us logically to the second answer.

SECOND.

But before discussing the second reason the attention of the court should be called back *to the record*, for we have in the discussion of the first reason been following counsel for the plaintiff in error outside of the record and considering the effect of an *agreement* between Sears and the

company's agent. There was no such agreement. We repeat here the allegations of the answer:

"VI. That subsequent to the failure of the said Stephen P. Sears to make payment of the said annual premium falling due on said policy May 18, 1893, and subsequent to the lapsing of said policy for failure to make said payment, and after the said Stephen P. Sears was fully informed and knew that said policy had been by it declared lapsed and void for nonpayment of premium, this defendant, through its agents, applied to said Stephen P. Sears to make restoration of said policy by making payment of said defaulted premium and having the said policy restored to force, but that said Stephen P. Sears refused to make such payment and refused longer to continue said policy or make any further payments thereon, and then and there elected to have the same terminated, and this defendant, relying upon the said election and determination of said Stephen P. Sears, at all times subsequent thereto treated said policy as lapsed, abandoned and terminated, and relying upon the said conduct of said Sears abstained from taking any further action or step in relation to said policy, by way of notice or otherwise, in order to effect the cancellation and termination thereof."

It is seen from the foregoing that all that was done was: The agent called upon Sears and asked him to make restoration of the policy by paying a defaulted premium; but Sears refused to make *such payment*, and refused longer to continue said policy or make any further payments thereon, and elected to have the same terminated. Relying thereon, the defendant treated the policy as lapsed, abandoned, and terminated, and, relying thereon, abstained from giving a statutory notice or notices. The fact that the company subsequently treated the policy as lapsed would not tend to an estoppel unless, so treating the policy, a future notice or notices were withheld. In [illegible] particular manner the company looked at the policy or treated it would be immaterial, unless the company abstained from taking some step by way of statutory notice which it otherwise would have taken.

So far as what was said and done related to the past or the present, all of the generally enumerated elements of estoppel are missing. They are said to be six in number:

1. There must be conduct amounting to a representation or concealment of material facts.

2. These facts must be known to the estopped at the time, or knowledge thereof imputed to him.

3. The truth concerning these facts must be unknown to the other party at the time of the conduct and at the time of the action upon it by him.

4. The conduct must be done or representation made with the intention or at least expectation that it will be relied upon and acted upon by the other party.

5. The conduct must be relied upon by the other party.

6. Relying upon it, he must have acted upon it in such manner as to change his position for the worse.

Bigelow on Estoppel (5th ed.), p. 568.

Viewing the affirmative matter of the answer in view of these essentials of an estoppel in their order, we come first to—

First Essential.

It certainly cannot be said that there was any act, language, or silence by or on the part of *Sears* amounting to a misrepresentation or concealment of any fact. All that Sears is alleged to have said or done is, to wit: He knew that the company had declared the policy lapsed for nonpayment of premium. He refused to make the requested payment. He refused longer to continue the policy by making further payments. He elected to have the policy

terminated. There is nothing here constituting either misrepresentation or concealment.

Henshaw *vs.* Bissell, 18 Wall., 255–272.
Davis *vs.* Davis, 26 Cal., 23–40.
Tyler *vs.* Odd Fellows, *infra.*
Baals *vs.* Stewart, 109 Ind., 371, 378.

Second and Third Essentials.

No past or present fact is referred to except the previous declaration by the company of the lapsing of the policy for non-payment of premium. It is clear, upon the face of the statement, that this fact, if known to Sears, was also certainly known to the company.

Davis *vs.* Davis, *supra.*
Henshaw *vs.* Bissell, *supra.*
Strong *vs.* Ellsworth, 26 Vt., 366, 374.
Buck *vs.* Milford, 90 Ind., 291, 293.
Whittaker *vs.* Williams, 20 Conn., 98–104.
Greensburgh Co. *vs.* Sidener, 40 Ind., 424–435.
Welsh *vs.* Cooley, 44 Minn., 446.
Brant *vs.* Va. Coal & Iron Co., 93 U. S., 326–337.
Steel *vs.* Smelting Co., 106 U. S., 47.

Fourth Essential.

It is not alleged that what Mr. Sears did and said was done with the intention or expectation that the company would take or refrain from any action in reliance upon it. Sears had at the time a subsisting policy. The company's agent came to him asking him to restore the policy to force by paying the premium. The company knew, if the agent did not, that the policy was then in force, was not lapsed, was subsisting, and did not require restoration. The company sent its agent to Mr. Sears to represent to him the con-

trary, to mislead Mr. Sears as to his rights. The misrepresentation, if any, was made by the company, through its agent, and not by Sears. Therein lies the only representation which was made by either party as to facts past or present. It was not Sears who represented that the policy was lapsed, but the company, through its agent, made the representation to Sears and, making it, demanded or requested a payment of money which Sears was under no obligation to pay at that time. Sears refused to pay the money. In so doing he was well within his rights.

1st. The money was not yet due, he was not in default in respect of it, and could not be put in default for a period of time thereafter not less, in any event, than 30 days.

2d. There is no suggestion in the pleading that the agent presented or had with him the official receipt which alone, under the policy, would authorize the agent to accept the payment or authorize Sears to pay it to the agent. (See policy, Record, p. 6.)

But the answer negatives the existence of any intention on the part of Sears to induce the company to take or refrain from any act, especially any act in relation to such statutory notices. It is alleged that the company had previously, as a matter of fact, "declared the policy lapsed," of which Sears had been previously advised. It is alleged in paragraph V of the affirmative matter, on page 17, that the company had declared the policy lapsed, and so entered it upon its books and records. The case made does not show when this took place, save that it occurred after May 18, 1893, and prior to the death of Sears. The only information which this court has as to when this declaration and book entry took place is that the insurance company states to the court in its petition for certiorari (page 7) that "upon default in the payment of the second

annual premium the policy was entered upon the books of your petitioner as lapsed and forfeited." How could it be true, then, that Mr. Sears could have intended to mislead the company or could have intended or imagined that what he said to the agent would result in the company's withholding a future statutory notice or notices, when the company was at the same time declaring to him, by its agent, that the company had already terminated the policy and the policy was lapsed and void? The conversation did not have reference to the termination or forfeiture of a *live* contract. It related only to the restoration of an alleged *terminated* contract. Therefore it is impossible that Mr. Sears could have intended by what he said to cause the company to take any course of conduct looking to the future termination or forfeiture of the contract, or that anything he said would affect the withholding of a statutory notice or notices in the future to terminate a contract which the company had already declared terminated, and so informed him. Nothing was said or done (we gather from the answer) in relation to the future termination of that policy. No reference was made in the conversation to the giving of statutory notice, past or future; but if such an intention could by the most violent inference be imputed to him, how could it operate to mislead the company, which had already taken the position that the policy was terminated, and had so written it upon its books?

"It is difficult to see where the doctrine of estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud, and, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will

not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud.' 1 Story's Eq., 391. To the same purport is the language of the adjudged cases. Thus it is said by the supreme court of Pennsylvania, that 'the primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up.'"

Brant *vs.* Virginia Coal Co., 93 U. S., 326, 335–'6.

"Equitable estoppels are as binding upon parties and privies as legal estoppels, and are as effectual in courts of law as in equity. The act or assertion must be willful, with intent to deceive the other party. Parties are only estopped from denying their own acts when the denial operates to the injury of another, and when such expressions are expressly designed to and do influence the conduct of such person. 'An admission by the defendant intended to influence the conduct of the man with whom he is dealing, and actually leading him into a line of conduct which must be prejudicial to his interest, unless the defendant be cut off from the power of retraction, is the very definition of an estoppel *in pais*.'"

2 Herman on Estoppel, sec. 787.

"In order to create an estoppel *in pais*, or equitable estoppel, as defined and established by the law at the present time, there must be an admission intended to influence the conduct of the man with whom the party is dealing, and actually leading him into a line of conduct prejudicial to his interest, unless the party estopped be cut off from the power of retraction."

Ibid., sec. 792.

"An estoppel results from conduct which was intended to induce, and has induced, another to act to his disadvantage.

It can only come from a successful effort to get one to change his situation."

Tyler *vs.* Odd Fellows, 145 Mass., 134, 138.

"Applying this doctrine to the facts disclosed in this case, it will be seen that there is no evidence that the defendant, at the time he made the statements which it is insisted that he is concluded from denying, had any knowledge that the plaintiff intended to act upon the statements made in purchasing the note, or otherwise changing his position in regard to it. There is nothing in the evidence inconsistent with a belief on the part of the defendant, at the time he made the alleged statements in regard to the validity of the note, that the plaintiff was then the owner of it, or was acting as agent to obtain information for the assignees of the payees of it. The proof therefore entirely fails to establish the important element of knowledge and intent, on the part of the defendant, that the representation was to be acted on by the plaintiff. Estoppels are not favored in law, and everything necessary to establish them must be strictly made out in evidence."

Andrews *vs.* Lyons, 11 Allen, 349, 351.

"In this position thus established, it must be observed, that several things are essential to be made out in order to the operation of the rule: the first is, that the act or declaration of the person must be wilful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; he must, at least, it would seem, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured, if the representation be untrue; and the other must appear to have changed his position by reason of such inducement."

Copeland *vs.* Copeland, 28 Maine, 525, 540.

"Before it can be claimed that a party shall not be permitted to falsify even his own declaration, act, or omission, it must be shown that he thereby intentionally and deliberately led the other party to believe a particular thing true, and to act upon such belief (Civil Code, sec. 765, subd. 4).

And his answer to a pleading in a case must show that such was the fact."

Page *vs.* Smith, 13 Oregon, 410, 414.

Ins. Co. *vs.* Norris, 31 N. J. Eq., 583.
Ins. Co. *vs.* Mowry, 96 U. S., 544–547.
Henshaw *vs.* Bissell, 18 Wall., 271.
Long *vs.* Anderson, 62 Ind., 537–543.
Colter *vs.* Calloway, 68 Ind., 219.

Furthermore—

"The representation must have been a free, voluntary act, and if obtained by the party who has acted upon it, it must have been obtained without artifice. If it has been procured by duress or by fraud, there will be no estoppel upon the party making it, it would seem, though he made it with the full intention that it should be acted upon. Indeed, it is said that where the conduct supposed to have created an estoppel was brought about or directly encouraged by the party alleging the estoppel, none is created."

Bigelow on Estoppel (fifth ed.), 583.

Fifth and Sixth Essentials.

From what has been said, it is very apparent that there is no allegation in the pleading to the effect that the company relied on any statement of Mr. Sears, and, thus relying, acted differently from what it otherwise would have; that, relying on any such statement, it changed its position for the worse. It is not alleged that had it not been for the alleged statement of Mr. Sears it would have sent the statutory notice; in fact, its pleading shows just the contrary. It had already declared the policy forfeited. It had assumed the right to declare the policy forfeited without sending the notice, and, thus relying on its knowledge of the law of the contract and the facts, it had previously declared the policy forfeited, and so entered it upon its books. More than that, it is alleged that the company so informed Mr. Sears, which was tantamount to saying to him: We know our rights

under the contract. We have exercised them. The policy i dead. Nothing you may say or do will influence us to question a forfeiture already occurred and so entered upon our books As to that, our rights are fixed, but you may pay the premium if you will do so at once. Up to the time of the alleged interview, which it now appears was subsequent to the time it had declared the policy lapsed and forfeited, it had so acted upon its own construction of the contract. Who misled it in the first instance? Certainly not Sears. There was no subsequent change in the company's position for the worse. None is alleged. Did the company, when it approached Mr. Sears, proceed on the theory that it was in doubt about the validity of its previous declaration of forfeiture and sought the interview to set that doubt at rest? If it had a different object and it was seeking to get such statement upon which to predicate an estoppel, it should have so informed Mr. Sears. To do otherwise would have been to obtain such statement from him for that use by a trick or by deceit, which would kill the estoppel (Bigelow, *supra*, p. 583).

It is true the answer alleges that "relying on the conduct of said Sears, it abstained from taking any further action or step in relation to said policy, by way of notice or otherwise, in order to effect the cancellation and termination thereof," but it signally failed to allege that had it not been for such statement it would have acted in a different manner. More than that, the answer shows that it had already declared the policy forfeited and so entered it upon its books without serving a statutory notice. It had already assumed the position of forfeiting the policy without serving the notice. That position it maintained before the alleged interview with Mr. Sears, at said interview and ever since, and it even yet insists upon it. Then how can it successfully say that it withheld statutory notice in reliance on Mr. Sears' statements? It had refrained from giving a previous statutory

notice or notices. It so refrained before the interview with Sears, and after the interview it possibly still refrained.

A recent case from Massachusetts is directly in point. In that case a party insured his life in the Odd Fellows' Relief Association. By the contract he had power to designate at any time prior to death the person to whom the money should be paid at his death, so long as the person designated should be "an heir or member of the decedent's family," and not otherwise; and in case of no designation, the whole should be payable to his surviving widow for the use of herself and minor children, and if no widow should survive, then the amount should be paid to a guardian or trustee for said minor children. The insured had designated that $1,500 should be paid to his sister and $500 to his minor child. It was held that the designation of the sister was invalid because she was not a member of his family. The other facts and the law applicable fully appears from the following extracts from the opinion of the court:

"But the defendant contends that the plaintiff's right to recover the balance has been barred by the acts of his guardian. This claim suggests two questions: Is the plaintiff concluded by a written contract? Is he barred by an estoppel *in pais?* His guardian, Reuben Waterman, acting under an appointment in Connecticut, had an interview with the president of the defendant corporation, in which he informed him that he thought the plaintiff was entitled to $2,000. The president did not dispute that he was entitled to $500, but claimed the balance as belonging to Emily Jane Cook. It is fairly to be inferred from the report, that Waterman yielded readily to said claim, believing it to be well founded. There is nothing to indicate that he made any further assertion of his right, or that there was any controversy between the parties. Thereupon he was paid $500, and he signed, as guardian, a receipt for said sum containing these words: 'Which I hereby acknowledge to be in full of all demands or claims against said association which I now hold or to which I may be entitled as the assignee of L. E. Tyler, now deceased, and who was a member in class C in said association at the time of his death.'

Without considering whether a Connecticut guardian could bind his ward by a contract relating to property here, and assuming this to be in form a contract, and not a mere admission, we are of opinion that there was no consideration for an agreement not to claim the balance of the $2,000 to which the plaintiff was entitled. * * *

"It remains to inquire whether the plaintiff is estopped by the conduct of his guardian from maintaining this bill. It appears that, when Waterman received the $500, he understood that the defendant association would pay the remaining $1,500 to Mrs. Cook, and he made no objection thereto. An estoppel results from conduct which was intended to induce, and has induced, another to act to his disadvantage. It can only come from a successful effort to get one to change his situation (Plumer *vs.* Lord, 9 Allen, 455; Andrews *vs.* Lyons, 11 Allen, 349; Turner *vs.* Coffin, 12 Allen, 401; Carroll *vs.* Manchester and Lawrence Railroad, 111 Mass., 1). The act of the association by which its situation was changed to its detriment, and which is relied on as a foundation for an estoppel, was the payment of $1,500 to Emily Jane Cook. It does not appear that Waterman had a willful design to induce this act. On the other hand, the corporation seems to have proposed, and Waterman to have merely accepted, the payment to himself. It prepared a writing and sent it to him for his signature. He signed and returned it, and the draft was then sent him by mail. He passively assented to the arrangement which the corporation suggested. There is nothing to indicate that he received the plaintiff's money, and signed the receipt, with a view thereby to induce the making of a payment to said Cook. He seems rather to have understood that the corporation had decided for itself its action with reference to her, as well as to himself, and to have had no purpose, beyond getting what he supposed belonged to his ward. If the plaintiff could have been estopped by conduct of his guardian in a transaction of this kind outside of the State of his appointment, which we do not intimate, an essential element of estoppel was wanting, and this defense cannot prevail."

Tyler *vs.* Odd Fellows, 145 Mass., 134, 137, 138.

"The acts or declarations must have influenced the conduct of the other party to his injury. An estoppel can never arise by implication alone, except by some conduct which

induces action in reliance upon it to an extent which renders it fraud to recede from what the party has been induced to expect (Security Co. *vs.* Fay, 22 Mich., 467; 7 Am. Rep., 670). An equitable estoppel is only called into existence for the prevention of wrong and redress of injury. There must be some element of wrong in the action of the party creating it. He must know or have sufficient reason to believe that another party will place himself in a different position or subject himself to additional injury in consequence of the action or representation. * * * His action is to be referred to the contract, his motive to the necessity of making the proofs as a preliminary to securing the insurance. After he was requested to make the proofs he had agreed to make he made them, but the statement that he was induced to make them by the request is only a *post hoc ergo propter hoc.*"

Wheaton *vs.* Ins. Co., 76 Cal., 415, 432.

To work an estoppel the party sought to be estopped must have so conducted himself that a reasonably prudent man would believe that it was meant that he should act upon it.

Piper *vs.* Gilmore, 49 Me., 149, 154.

THIRD.

The foregoing discussion takes out of the case made any element of a misrepresentation relating to conditions, present or past; but it will be argued on behalf of the plaintiff in error that Sears is alleged to have made certain representations as to the future, and that such representations as to the future are found in his refusal to longer continue the policy or make any further payments on it, and that he then and there elected to have the same terminated.

Bigelow in his work on Estoppel (*supra*, p. 574) thus speaks of this branch of the subject:

"The representation of concealment must, also, in all ordinary cases, have reference to a present or past state of things; for if a party make a representation concerning something in the future, it must be shown by either a mere

statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract, with the peculiar consequences of a contract."

The doctrine is thus stated in 2 Herman on Estoppel and Res Adjudicata, page 902, section 778:

"An estoppel from the representations of a party can seldom arise, except where the representation relates to a matter or fact, to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances, of which either party can have no certain knowledge."

The case made at bar is a strong illustration of this author's text. The refusal of Sears to pay future premiums made at a time when he was not in default in respect thereto was but the expression of his then intention or present opinion, liable to modification or change upon a change of his circumstances, in regard to which neither party could at that time have any certain knowledge.

The author (Herman) goes on to say:

"The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act."

Sears had at that time an existing right, to wit, the subsisting contract of insurance. It will be claimed that his refusal to pay future premiums bore relation to an intended abandonment by him of that existing right. If so, is the allegation of the answer sufficient to show that this representation of his present or future intention to abandon that existing right was made by him to influence the petitioner, and that by it the petitioner was induced to refrain from subsequently giving the statutory notice? If so, does it

sufficiently appear that detriment resulted to the petitioner therefrom?

The doctrine of Herman's text is taken from the decision of this court in the case of Insurance Co. *vs.* Mowry, 96 U. S., 544–547. This court in that case uses the language which Herman has taken as his text (above quoted) and proceeds as follows:

"The doctrine of estoppel is applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party, who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, *designedly* (italics are ours) induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his right against his declared intention of abandonment."

The supreme court of Pennsylvania in Stayton *vs.* Graham, 139 Pa. St., 1; S. C., 21 Atl. Repr., 2, says of this branch of the doctrine of estoppel:

"The doctrine of estoppel is applied to prevent statements of intended abandonment of existing rights from operating as a fraud upon a party who has been led to rely on them and thereby *change his conduct* and alter his condition."

The supreme court of Massachusetts had the question before them in the case of Langdon *vs.* Doud, 10 Allen, 433, wherein the holder of a promissory note sought to avoid the plea of the statute of limitations interposed by the defendant by allegation and proof that the defendant told the plaintiff he was going to California, never to return. He went to California, but returned. The plaintiff offered evidence to show that he was induced by the defendant's statement to believe that the defendant never would return, and therefore did not bring any suit in Massachusetts in his absence, believing that he intended to reside in California,

and that if he should happen to return, the time of his absence would be deducted from the statutory bar. The court, in discussing the alleged estoppel, say:

"A person cannot be bound by any rule of morality or good faith not to change his intention, nor can he be precluded from showing such change merely because he has previously represented that his intentions were once different from those which he eventually executed. The doctrine of estoppel or exclusion of evidence on the ground that it is contrary to a previous statement of a party, does not apply to such a representation. The reason on which the doctrine rests is that it would operate as a fraud if a party was allowed to aver and prove a fact to be contrary to that which he had previously stated to another for the purpose of inducing him to act and to alter his condition to his prejudice on the faith of such previous statement. But the reason wholly fails when the representation relates only to a present intention or purpose of a party, because being in its nature uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action. There is another decisive objection to the application of the rule in question to the case at bar. The jury have found that the alleged statement or representation made by the defendant to the plaintiff was not made for the purpose of deceiving the plaintiff nor inducing him to believe that he intended to take up a permanant residence in another State. This special finding seems to be in accordance with the evidence as stated in the exceptions and the nature of the statement itself. There is wanting, therefore, an essential element without which the rule contended for by the plaintiff cannot be applied in any case; that is, that the defendant intended, when he made the alleged representation, that the plaintiff should act on the faith of it."

The same court, in the later case of Anderson *vs.* Lyons, 11 Allen, 349, states:

"The modern doctrine on this subject of estoppels *in pais* is thus stated by Lord Campbell in Howard *vs.* Hudson, 2 El. & Bl., 10: 'If a party willfully makes a representation to another, meaning it to be acted upon, and it is so acted

upon, that gives rise to what is called an estoppel. It is not quite properly so called; but it operates as a bar to receiving evidence contrary to that representation, as between those parties. Like the ancient estoppel, this conclusion shuts out the truth, and is odious, and must be strictly made out. The party setting up such a bar to the reception of the truth, must show that there was a willful intent to make him act on the faith of the representation, and that he did so act.'"

The supreme court of Massachusetts then proceeds as follows:

"Applying this doctrine to the facts disclosed in this case, it will be seen that there is no evidence that the defendant at the time he made the statements, which it is insisted that he is concluded from denying, had any knowledge that the plaintiff intended to act upon the statements made in purchasing the note or otherwise changing his position in regard to it. * * * The proof, therefore, entirely fails to establish the important element of knowledge and intent, on the part of the defendant, that the representation was to be acted on by the plaintiff. Estoppels are not favored in law, and everything necessary to establish them must be strictly made out in evidence."

The court in the last case was dealing with a representation of a fact—*i. e.*, a thing which had happened.

In Powell *vs.* Rogers, 105 Ill., 318, Powell commenced an action to foreclose a mechanic's lien, making Mrs. Rogers, who had a mortgage upon the property, a party defendant. He obtained a decree and bid the property in at sheriff's sale. He went to Mrs. Rogers and offered her his certificate of purchase for $50. She declined to purchase it or redeem from the sale, and stated to him that she would do nothing more about the matter. He then made expensive improvements on the property. Thereafter she filed a petition to vacate the decree and was successful. Rogers then filed an amended or supplemental petition to foreclose his lien, set-

ting up the facts aforesaid as an estoppel. Of these facts the supreme court on appeal say:

"We see nothing in this evidence to create an estoppel *in pais*. No fraud was shown on her part, nor was there any deception. The fact that in 1874 she declined to buy the certificate of purchase or redeem from the sale, and said she should do nothing more about the matter, could not in any manner deceive appellants, nor do we believe that such conduct or declarations induced them to do anything in reference to the property that they otherwise would not have done. * * * From the facts, the only reasonable conclusions is that appellants erected the house relying upon the validity of the title they had acquired rather than upon anything said or done by Mrs. Rogers, and if such was the case, they cannot claim or rely upon the doctrine of estoppel."

In Commonwealth *vs.* Moltz, 10 Pa. St., 527, a ward gave a receipt in full to her guardian. He died, leaving that receipt among his papers, whence it came into the hands of his administrators. The administrators settled his estate and distributed it among his heirs without requiring refunding bonds, as they might have done. The ward knew that they were distributing the estate. She afterwards sued them to recover a sum unaccounted for to her by her guardian, their intestate. The administrators claimed an estoppel from these facts:

"They claimed to have relied on this silence and the receipt of the ward in neglecting or declining to take refunding bonds from the distributees; but of this there is no proof beyond their assertion. * * * To the constitution of this species of estoppel at least three ingredients seem to be necessary—first, misrepresentation, or wilful silence by one having knowledge of the fact; second, that the actor, having no means of information, was, by the conduct of the other, induced to do what otherwise he would not have done, and, thirdly, that injury would ensue from a permission to allege the truth. *And these three things must appear affirmatively.*"

Mr. Justice Cowen, in Dezell *vs.* Odell, 2 Hill, 219, defines an estoppel *in pais* to be "an admission intended to influence the conduct of the man with whom the party is dealing, actually leading him into a line of conduct which must be prejudicial to his interest, unless the party estopped be cut off from the power of detraction."

The supreme court of Pennsylvania, in the recent case of Stewart *vs.* Parnell, 147 Pa. St., 523, says:

"It is of the essence of an estoppel *in pais* that the party alleging it must have been induced to act upon a misrepresentation or concealment, and his action must have been of a character to result in substantial prejudice were he not permitted to rely on the estoppel."

The rule announced by Coke, that "every estoppel must be certain to every intent, and not to be taken by argument or inference," holds good today, and is especially applicable to the *pleading* of an estoppel, so that an estoppel must be pleaded with certainty and definiteness, so as to leave nothing to inference or implication.

A settled rule of pleading is that estoppels must be specially pleaded with great particularity and precision, leaving nothing to intendment.

Sims *vs.* City of Frankfort, 79 Ind., 446–452.
Bigelow on Estoppel, *supra*, 699.
Lorentz *vs.* Lorentz, 14 W. Va., 809, 821.*
Vanbiber *vs.* Beirne, 6 W. Va., 169, 178.
Andrews *vs.* Lyons, *supra*.

This rule requiring certainty should be applied most strictly to the case of an estoppel arising from a representation as to a present or future abandonment of an existing right. It is respectfully submitted that the plea under consideration does not come up to the requirement of certainty, and for that reason the action of the circuit court in

sustaining a demurrer to it was rightly affirmed by the circuit court of appeals.

What has been hereinbefore said in relation to the facts is more forcibly applicable here. The company refrained from giving notices before Sears stated his intended abandonment of his existing right. It pursued the same conduct thereafter. It had refrained before, it may have refrained afterwards. It certainly did not change its conduct. It is not alleged that but for the statement it would have adopted a new line of conduct and given a statutory notice. It does not appear that Sears at the time intended or expected or had any reason to expect or suppose that what he was saying would influence the company to adopt or change any line of policy or would even be taken into consideration by the company in shaping its policy. It does not appear (it could not) but that if thereafter a statutory notice had been given Sears might have changed his mind and made the payment.

"A party setting up an esotppel must always show as an essential part of his case that he will be subjected to loss if he cannot set up the estoppel. There is no presumption in his favor. * * * The whole office of an estoppel is to protect from otherwise inevitable loss." Bank *vs.* Todd, 47 Conn., 190–218.

The company had already declared the policy forfeited; had so written it upon its books. Its action showed it did not consider the sending of a notice necessary, alike before and after the statement. The statement had no relation to the giving of the statutory notice. The matter of the statutory notice was not the subject of the conversation. Nothing was said in the conversation to indicate that the company had any intention of giving the statutory notice at any time, or that it had ever had such intention or purpose. The company, by its agent, approached Mr. Sears, not in relation to terminating the policy, but of revivifying it. The

company spoke of it as a dead contract, and so represented it to Sears. It would be straining the pleading to gather from it, even by implication or argumentatively, that the statement was made by Sears with the intention of inducing the company to withhold future efforts to terminate the contract, or that any future action would or could in the nature of things be taken or withheld by the company in reliance upon his refusal to make future payments.

FOURTH.

It is not alleged that the company refrained from any particular act—simply that it refrained from all acts. The only act from which it could have refrained after Sears' statement of intended abandonment was the mailing of the statutory notice, for it could terminate the insurance in no other way. At any rate, it could terminate the insurance in no other way by its own act alone. Therefore the question is to be tested by considering whether or not because of Sears' statement it withheld a statutory notice, and this brings into prominence the point of time when the statement was made. As has been before stated, if the death of Sears had followed immediately upon the statement no notice could have been mailed, and therefore the element of prejudice to the company would be missing, and there could be no estoppel. The New York statute limited the occasion upon which such a notice could be given with the effect provided by the statute. Under the act of 1877 the notice might follow the due date and be given at any time. If the notice was given in advance of the due date it could be given on one occasion only each year, to wit, at least 30 days and not more than 60 days prior (in the case at bar) to May 18. Under the act of 1892 it could not be given after the due date, but only prior thereto, and then not more than 45 nor less than 15 days prior. So that *under the act of 1892* there was a period of 30 days during each year when the notice could be given.

If this statement was made by Sears after May 3, 1897, no action could be taken or withheld by the company on account of it until between April 3 and May 3, 1898; but Sears died in March, 1898, and therefore, if the statement was made by Sears at any time after May 3, 1898, the company could not, in the nature of things, be said to have withheld the statutory notice on account of it, because Sears' death, intervening before the arrival of the next occasion when the statutory notice could have been given, renders it an impossibility that the company's position could have been changed to its prejudice because of the statement.

Under the act of 1877, if the company had availed itself of the right given by statute to give the notice on account of a past default, the notice could have been mailed at any time up to the day of the death of Sears, but if it had been mailed within thirty days prior to the day of his death the policy would, at the time of his death, have been a subsisting contract, because he would have had, under the statute, all of those thirty days in which to pay the premium, so that if the statement of intended abandonment was made by Sears at any time within the thirty days preceding his death, then in such event the company could not have been prejudiced by refraining from a notice in reliance upon his statement.

So that under either statute there was a period of time within the allegations of the pleading during which the statement of Sears of his intended abandonment might have been made without prejudice to the company, and the time of the making of the statement of intended abandonment may have been so placed that the company cannot be heard to say that because of it it refrained from giving a notice, because the giving of the notice, if the company had given it, would not have of itself had the result of terminating the contract. If, then, the allegations of the answer are such that they may all be true and yet the result claimed

could not possibly have happened, the defense was vulnerable to the demurrer.

The allegation fixed the time of the making of this statement by Sears at no particular date, but confined it between May 18, 1893, and the day of the death of Sears, which occurred March 30, 1898. In this period of time between May 18, 1893, and March 30, 1898, there is a line of demarcation on one side of which the event may have occurred (the statement of intended abandonment made) without any of the consequences which the plaintiff in error would attach thereto. The placing of the time of the event on the one side or the other of this line of demarcation was material, because if placed upon one side the defense must fall, regardless of every contention which can be advanced in support of it. The plaintiff could admit (as the demurrer admitted) every allegation contained in the affirmative defense, and yet the answer would not have constituted a defense, because, for anything that appears to the contrary, the event did happen on the prohibited side of the line.

The law supposes that every suitor will state his case as strongly as the facts warrant, and hence the rule that a pleading is taken most strongly against the party making it.

Green *vs.* Covillaud, 10 Cal., 317, 323.

If all that is set up in an answer may be true and yet the plaintiff be entitled to recover, a demurrer is properly sustained thereto. If the answer is evasive as to a particular time, place, or circumstance, the exact time or place of which is essential, it is insufficient to constitute a defense.

City of Covington *vs.* Powell, 2 Mete. (Ky.), 226.

In order for this plea of estoppel to be sustained (assuming, for the sake of the argument, that it is otherwise good), it is necessary to suppose that Sears' statement was made more than a certain length of time before his death, therefore the plea rests for its validity upon a supposed state of

facts which may not exist, and this court has held that "a plea cannot be sustained which rests for its validity upon a supposed state of facts which may not exist."

Lyons *vs.* Burtram, 20 Howard, 149.
Bartemeyer *vs.* Iowa, 18 Wall., 129–134.

Baylies, in his work on Code Pleading and Forms, section 12, thus states the rule under consideration:

"Under the Code, if the time when a fact happened is material to constitute a defense, it must be stated, and a failure to state it renders the pleadings demurrable."

To the same effect is—

Tullock *vs.* Webster County, 46 Neb., 211; 64 N. W., 705.
Lockwood *vs.* Bigelow, 11 Minn. Reps., 113, *70.
Balch *vs.* Wilson, 25 Minn., 299.

Certain it is that no intendments are indulged in favor of the plea of estoppel, and the allegations thereof should especially be subject to the rule construing a pleading most strongly against the pleader.

To establish an estoppel the facts which are supposed to call for its application must be unquestionable and the wrong which is to be prevented be undoubted.

Maxwell *vs.* Bridge Co., 46 Mich., 278.

Estoppels never arise from ambiguous facts. They must be established by those which are unequivocal and not susceptible of two constructions.

Fredenburg *vs.* Church, 37 Mich., 476.

FIFTH.

The defense of estoppel is not permissible under the statute. The statute reads:

"No insurance company shall have power to declare lapsed or forfeited any policy of insurance hereafter issued or renewed, except as hereinafter provided."

There is no attempt to maintain that the policy was forfeited in the manner provided in the statute. There is no claim that the defense shows as a fact that the policy was forfeited; but the defense is that Mrs. Sears is estopped to claim that it was not forfeited. The position of plaintiff in error is this: that while the statute does not permit it to declare a forfeiture except by showing compliance with the statute, yet it may defend on the ground that a forfeiture has been declared and in fact occurred, notwithstanding the statute.

We maintain that the statute should be construed as though it contained these further words: "Nor shall any company defend in any court of law or equity on the ground that any policy is lapsed or forfeited unless it shows compliance with this act as hereinafter provided." It would be idle to say an insurance company shall not declare a policy forfeited for non-payment of premiums except in a certain way, and yet permit it to make a defense of forfeiture for non-payment of premium on other and prohibited grounds, such as the company is attempting to make in this case.

The statute then proceeds to lay down a rule as to how and when the forfeiture may be declared. "When any premium or interest due upon such policy shall remain unpaid, a *written* or *printed* notice," etc., shall be served. Does not that exclude *oral* notice? When the statute says no policy shall be declared lapsed *except as herein provided*, would it be competent for an insurance company to say, we gave the

notice required by the statute, except our notice was given orally by an agent? Surely not in the face of a statute which requires such notice to be in writing. The supreme court of Connecticut, in speaking of the claim made by a party to a suit on an insurance contract that an oral consent was equivalent to consent in writing, the statute requiring that it should be in writing, says:

"The evil could not be successfully reached by merely requiring the *consent* of the company to such further insurance. There would be no security from misunderstanding, misremembrance and fraud. The difference is great between leaving the consent of the company to be proved by the vagueness and uncertainty of parol evidence, and requiring it to be shown by a formal endorsement upon the policy under the hand of their secretary, which could not be made without consideration and deliberation on the one hand, and certainty of the fact on the other (Hale *vs.* Mechanics' Mut. Fire Ins. Co., 6 Gray, 169). * * * *We think therefore that the legislature had more than this in view, and intended to limit the power of the company in the matter. If then the twelfth section must have such construction, manifestly it could not be waived by the defendants,* or departed from in any essential particular. * * * We think, therefore, that it was not competent for the plaintiff to prove the consent of the defendants to the double insurance on the plaintiffs' property, by any other evidence than an indorsement of such consent on the policy under the hand of the secretary of the company: and that the jury should have been so instructed."

Couch *vs.* Ins. Co., 38 Conn., 181, 186, '87.

To the same point is the case cited from Massachusetts, where it was provided by the by-laws of a mutual insurance company that the president of the company could only consent to additional insurance by written endorsement. By a statute it was provided that the corporation could only alter the by-laws at a regularly called meeting by two-thirds of the members present voting for the proposed amendment.

It was claimed that a verbal consent was sufficient. The court uses this language:

"By article fifteenth of the by-laws, his power to assent to subsequent insurance was expressly confined to giving such assent in writing. In order to guard against the danger of over-insurance, the corporation might well require that any assent on their part to further insurance on property insured by them should be given by the deliberate and well-considered act of their president in writing, and not be left to the vagueness and uncertainty of parol proof. The whole extent and limit of the president's authority in this respect were set forth in the by-laws attached to the policy in the present case, and, as the evidence shows, were fully known to the assured (Worcester Bank *vs.* Hartford Fire Ins. Co., 11 Cush., 265; Lee *vs.* Howard Fire Ins. Co., 3 Gray, 589, 594)."

Hale *vs.* Ins. Co., 6 Gray, 169, 173.

This is especially the rule in cases where the statute as a matter of public policy requires a thing to be done in a specified way.

The statute also provides:

"Such notice shall further state that unless the said premium or installment then due shall be paid to the company or its duly authorized agent or other person authorized to collect said premium, within thirty days after the service of the notice, the said policy and all payments thereon will become forfeited and void."

It has been held that this is essential to a valid notice. It cannot be omitted, nor can an insurance company substitute for such language any other which it may equivalent in meaning. In the case of Phelan *vs.* Insurance Company, 113 N. Y., 147, the company sent a communication to the insured as follows:

"The 4 qr. premium of $17.40 on your policy, No. 102,320, falls due at the office of the agent of this company in New York city, N. Y., before noon on the 31st day of December, 1882. The conditions of your policy are that payments must

be made on or before the day the premium is due, and members neglecting so to pay are carrying their own risk. Agents have no right to waive forfeitures. Please present this notice at time of payment.

"Yours respectfully, J. W. SKINNER, *Secretary.*

"Prompt payment is necessary to keep your policy in force."

The company claimed that this was equivalent to the statutory notice. The court held:

"There is no pretense that this notice (meaning the statutory) was given; but, on the contrary, the argument of the defendant is to the effect that it did another thing which the statute makes equivalent thereto. As to that the provision is that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner 'above stated,' at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the notice before provided for. That such notice had been given was a fact to be established by the defendant before its defense could be maintained, and whether it was so established is the only question on this appeal.

"We are also of opinion that the notice does not in its terms conform to the statute. Many ignorant and unlearned people seek to avail themselves of the advantages proposed by these companies. The statute is designed for the protection of all classes, and the language it prescribes for notice is intelligible to all. To say that in a declared event 'a policy will become forfeited and void,' conveys a meaning easily to be comprehended. To refer to the policy and conditions and say that 'members neglecting so to pay are carrying their own risk,' is quite another thing; and while it may be comprehensible to those versed in the language of insurers and accustomed to their phraseology, it is not the language of the statute and does not embody the notice which the statute requires. The principle upon which our decision in the recent case of Carter *vs.* Brooklyn Life Insurance Company (110 N. Y., 15) rests applies and requires that the appeal should succeed."

Phelan *vs.* Ins. Co., 113 N. Y., 147, 150, 151, 152.

So it is not enough that the insurance company serve a written or printed notice, but it must conform in language to the statute; and so knowledge of the due date is *not* enough, even though given the necessary thirty days by notice, if the notice does not conform to the language of the statute.

By serving the notice thus required, the company is made to say and admit to the insured, "Your policy is alive. You can pay the premium within thirty days." What was the position assumed by the company in this case, as indicated by its affirmative defense? Instead of thus admitting the policy was alive by serving the notice, it orally notified and asserted to Mr. Sears that his policy was forfeited. Instead of notifying him in writing, "Your policy will be forfeited and void if you do not pay your premium within thirty days," it informed him orally that it was already forfeited and requested immediate payment as a condition of *restoration*. This is not only an entire failure on the part of the company to conform to the statute, but is in direct violation of it, both in letter and in spirit.

The statute further provides:

"In case payment demanded by such notice shall be made within 30 days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to payment of said premium or interest, anything therein contained to the contrary notwithstanding."

The allegations of the plaintiff in error show that not only did it fail to comply with the statute as above suggested in many respects, any one of which is fatal to its defense, but that its demand was for an immediate payment of the premium, which was refused. It had no right to make such a demand in writing, much less orally. If it had otherwise complied with the statute the demand for payment in less than 30 days would have been fatal and rendered the action it took of no avail. In the case of Hicks *vs.* Ins. Co.,

60 Fed., 690 (C. C. A.), a notice in compliance with the statute in language had been served only 29 days prior to the date upon which payment was demanded. The court held that it was insufficient:

"The notice must state that unless the premium shall be paid within 30 days after the mailing of the notice, the policy will become void. The intention is obvious, from the language, that the person insured shall have 30 days within which to make payment and save forfeiture after the mailing of the notice. The policy cannot be forfeited 'until the expiration of 30 days after the mailing of such notice.' The proviso authorizing an advance notice to be given is not intended to curtail the privilege of the assured, but gives the insurance company the option of serving the notice with the same effect as though served subsequently to a default; but it provides that this notice shall be served at least 30, and not more than 60, days prior to the day when the premium is payable. * * * Excluding, as must be done according to the authorities, the day of mailing in the computation in the present case the notice was served by the defendant 29 days, and not 'at least 30,' prior to the time when it should have been in order to effectuate the forfeiture. The defendant is in no better position than it would be if no notice had been mailed."

Hicks *vs.* Ins. Co., 60 Fed., 690, 693.

"No proof was given of compliance with the statutory provision in regard to the mailing of the notice, but the argument of the respondent is that the regularity of its proceedings in those respects is to be inferred from the fact that the notice was found among the papers of the deceased. The evidence is insufficient for that deduction. * * * Nor does the fact that the notice was in the possession of the assured on the 17th of January, 1883, afford any ground for inference that he received it in due course of mail, nor that it was served upon him or received by him at any day earlier than January seventeenth."

Phelan *vs.* Ins. Co., 113 N. Y., 147, 151.

The demand of the company, if made, in this case was rightfully refused. Mr. Sears had full thirty days after the

service of the statutory notice to determine whether he would pay the premium. A demand for immediate payment was of no force. The company, if it made any such demand, well knew and was conclusively bound to know that it was of no force or effect. His refusal to pay, in so far as it affects the forfeiture provision under the statute, amounts to nothing. The only evidence permissible to prove non-payment or his inability or disinclination to pay would be his failure for thirty days after service of the notice to pay, after he had had the full thirty days in which to determine his course and to prepare to meet the payment, with the printed notice before him warning him of the penalty of his default. He might determine any day to pay, and any previous declaration to the contrary would not affect him or his right. It is not any declaration he may make in advance as to whether or not he will pay, but his failure to pay after being put in default according to the exclusive method provided by the statute, that determines his rights and fixes his status in reference to the forfeiture provision of the policy. Such a declaration made at any time before the service of the notice would have no more force to bind him than a statement to that effect made the day after the issuance of the policy. The company could no more successfully rely on the one than on the other.

The statute also required the notice to state to whom he should pay the premium, so that payment to that person should be a good payment. The person to whom payment might be made was left to the determination of the company, the only requirement being that he should be authorized and the insured be notified by the company that such party was authorized. The policy itself provides:

"All premiums are due and payable at the home office of the company in the city of New York; but will be accepted elsewhere, when duly made *in exchange for the company's receipt, signed by the president or secretary.*"

There is no claim that the agent had any such receipt with him or that the company had sent the statutory notice or any other notice to the effect that such agent was authorized to receive the premium. Then, to Mr. Sears such agent was a stranger. He had no right to accept his declarations or statements. He had no right to make payment to him, nor would he be able to rely on any statement made by such party. Especially is this true under another provision of the policy:

"Notice to the holder of this policy.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy."

See Record, pp. 8 and 9.

These provisions were inserted by the company for its benefit—for its protection. Such provisions have done it service in a hundred contests. Why should it repudiate them now? There is no pretense or claim in its pleadings that it gave such agent special written authority to make any such demand, or in effect to enter into such an alleged new contract, or that such agent, having such authority, communicated such fact to Mr. Sears, or that as a fact he had such authority.

We think no one can read the statute carefully, especially in light of the decisions upon it, or like statutes, but he will at once conclude that it was the intention of the legislature in enacting this law to establish by it a definite, fixed, and absolute rule for the forfeiture of insurance contracts; one that would be universal and not subject to be set aside; one that would enable the insurance company to enforce the forfeiture feature in entire accordance with the terms of the contract, making the method of service easy and proof of the service equally easy and simple. But, on the other hand, it made this method mandatory and exclusive. It took

great pains in framing the provisions of the act to guard against any possible evasion of any of the rights and privileges conferred upon the insured by the act: (*a*) The notice must be in writing, not oral; (*b*) it must name the amount of the premium and the date of its payment; (*c*) it must contain words of warning; (*d*) it must be addressed at the last known post-office address; (*e*) it must have the postage prepaid; (*f*) it must give imsured at least thirty days in which to prepare for and pay the premium. None of these things may be evaded. This notice may be served before or after due date named in the policy, but one or the other notice must be served; and—

"In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; *but no such policy shall in any case be forfeited* or *declared forfeited* or *lapsed* until the expiration of thirty days after the mailing of such notice." (See act.)

The necessity of compliance with the statute in all respects is well illustrated by the decision of Mr. Justice McKenna, when a member of the circuit court of appeals, in the case of Provident S. L. A. *vs.* Nixon, 73 Fed., 144, from which we quote:

"The statute is explicit as to when and where and how notice shall be sent to the assured that a premium is due. The provision and language is that it 'shall be duly addressed and mailed to the person whose life is assured * * * at his or her last-known post-office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium' (3 Rev. St. (8th ed.), 1686.) It is contended by plaintiff that his proof shows a compliance with the statute. It does not explicitly, but it is claimed as an inference from the word 'mailed;' and that this word implies prepayment of postage is said to be supported by the following cases:" * * *

"We should be disposed to follow these decisions if the witnesses of plaintiff in error had testified that they had mailed the notices, without adding explanations; certainly to the extent of holding that the testimony should have been submitted to the jury. It is true that William E. Stevens, secretary of the company, testifies that the notices were mailed; but this was hearsay, and properly excluded. The other two witnesses, Meeder and Prosser, testify as to the point involved, very much alike; and while each, in reply to the question if he had mailed the notices, answered "Yes," each enumerated what he did, and did not include in the enumeration payment of postage. To allow the testimony to be proof of the requirements of the statute would be to relax it too much, and afford opportunity for its evasion."

In the case at bar the company is defending, as a matter of fact, without pretense of having served the notice. What could the statute mean by the use of the words "but no such policy shall *in any case* be forfeited or declared forfeited," etc., if it had not in view a defense of the character here insisted upon? Did not the legislature intend to eliminate any defense of forfeiture except as provided by the act? From the evident intent of the legislators and their purpose in framing the act, can its language be construed to mean anything else? Does not the language itself exclude any other construction?

The statute which requires the insurance company to serve a specified printed notice instead of oral notice was formulated in part on the true theory that in most cases where controversies would arise over the forfeiture of insurance policies under it the insured would be dead. The notice would speak for itself, and would convey to the insured the information that the legislature thought he ought to have. The information would be full and complete and could not be misunderstood. If the insured did not act upon it, he would suffer the consequences of his own neglect. But if, on the other hand, it permitted an oral notice to be given or an oral waiver of the notice or per-

mitted alleged admissions of the insured to take the place of the written notice it would be giving an unfair and enormous advantage to the insurance company. The dead could not be called back to life to tell his side of the story. It would leave his representatives wholly at the mercy of the agent of the insurance company. There would be no way to meet such testimony. Every incentive would thus be given to relate only what was beneficial to the one party and conceal everything to the advantage of the other. To give one side such an advantage would be unfair, unjust. This statute, we maintain, is not susceptible of any such construction. In construing this statute it must be borne in mind all the while that its purpose is protection to the insured.

There is every reason for this rule that there is for that rule established by statute in nearly all States, that no party to an action against the representatives of a deceased party shall be permitted to testify as to what took place between the decedent and such party. All courts have upheld such statutes and enforced them rigorously, as strongly suppressive of fraud. If such a defense as this may be upheld, the statute is of very little consequence, and insurance companies whose agents are of easy conscience can always successfully defend, though they may have violated every essential feature of the statute. No court has so far sustained such a defense; on the contrary, the courts have held the companies to strict compliance.

IV.

Abandonment or Subsequent Waiver.

It may be claimed, however, that though the waiver in the policy is ineffectual and the facts pleaded are insufficient to constitute an estoppel *in pais*, nevertheless the facts pleaded are sufficient to show an abandonment or waiver.

Certainly it will not be claimed that the statement of Mr. Sears would constitute a waiver of future statutory notices. If the facts are insufficient to create an estoppel *in pais*, their insufficiency for the other purpose seems to follow. If it was incompetent for him in the policy in 1891 to waive the subsequent annual notices, certainly he could not by parol in 1893 or later year waive those yet to follow. If he could not on January 1, 1893, waive the notice of the premium of May 18, 1893, could he do so on May 19, 1893? The first-named date was in advance of the maturity of the premium, in advance of default. So was the latter, for under the statute and the decisions he had thirty days after notice in which to pay. If it was against the public policy of the statute that he should waive in advance, it is equally so at any time when he was not in default.

The only allegation in the answer which the plaintiff in error can claim to be a basis for a statement of abandonment is the refusal to pay passed premiums and future as well, and that he "then and there elected to have the same (meaning the policy) terminated." It is not alleged that he was at the time advised of his rights in the premises. On the contrary, it is alleged that the company represented to him that his policy was already lapsed, forfeited, and terminated.

"There is no question, of course, but that a court of equity cannot grant relief solely upon a mistake of law. But there was here more than a mistake. There was a surrender of legal rights intentionally induced and procured by a false representation as to the law governing the case. The defendant must be presumed to have known that it was liable for the whole loss and by falsely representing that under the law applicable to the case the policy was void, when in fact it was valid, it induced the plaintiff to rely upon the superior knowledge that it possessed upon the subject and to surrender to it his claim.

"This clearly constitutes fraud and there would be mani-

fest injustice in upholding a settlement under such circumstances."

Berry *vs.* Ins. Co., 132 N. Y., 49, on pp. 53–'4.

So that if he had said, "I hereby abandon my policy," there is no reason in law or morals why he should not be permitted to change his mind the next day and determine not to abandon.

The company would not be injured by the change. This shows that the abandonment or subsequent waiver proposition is but the estoppel *in pais* proposition under another name. Indeed, WAIVER AND ESTOPPEL AS APPLIED TO INSURANCE CONTRACTS ARE SYNONYMOUS TERMS.

This is recognized by courts and text writers.

Mr. Bacon, in his work on Insurance, states the proposition as follows:

"It will be seen from an examination of the cases cited in this chapter, as well as from the preceding sections, that if the words waiver and estoppel, as used in insurance cases, are not synonymous terms, the line of separation between them is so shadowy and uncertain that it cannot always be distinguished. * * * We shall not, therefore, in the succeeding pages attempt to distinguish between cases of waiver and those of estoppel, because if attempted it could not always be done. It will be readily seen that the same facts may be construed both to amount to the waiver of a right, otherwise enforceable, and to estop the party from asserting such right as a defense. What name to give to the legal effect of a certain condition of facts often depends upon the point of view from which such facts are regarded."

2 Bacon, Benefit Soc. & Life Ins., sec. 421, pp. 830, 831.

Mr. May's statement is in these words:

"The terms 'estoppel' and 'waiver,' though not technically identical, are so nearly allied, and, as applied in the law of insurance, so like in the consequences which follow their successful application, that they are used indiscriminately by the courts."

May on Insurance, vol. 2, 3d ed., sec. 505.

The supreme court of Michigan, in discussing the question of waiver as applied to an insurance contract, reaches the same conclusion in these words:

"The waiver that is spoken of in these cases is another term for an estoppel. It can never arise by implication alone, except from some conduct which induces action in reliance upon it to an extent that renders it a fraud to recede from what the party has been induced to expect. It is only enforced to prevent fraud."

Security Ins. Co. *vs.* Fay, 22 Mich., 466, 473.

The circuit court of appeals for the ninth circuit says:

"The plea of estoppel, as set forth in the third affirmative defense, is but another name for waiver. There is no question concerning the plea of estoppel that can be distinguished from the question as to the plea of waiver."

Ins. Co. *vs.* Hill, 97 Fed., 263, 270.

To the same effect is a decision of the supreme court of Illinois:

"Many of the cases cited by appellee's counsel recognize that a forfeiture may be waived by those who are held out as agents of insurance companies, but we do not consider it necessary to notice them further than to say that in none of them is the doctrine recognized that there is a waiver where there is neither a contract to that end, supported by a sufficient consideration, and having the other essential requisites to a legal contract, nor the necessary elements of a legal estoppel."

Society *vs.* Baldwin, 86 Ill., 479, 486.

Texas Banking Co. *vs.* Hutchins, 53 Tex., 61.

"A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of such intent, and where it appears that there was no such intent in fact, and no understanding on the part of the insured that the proofs were waived, so that he was not misled, it will be held that there has been no waiver (Findeison *vs.* Metropole Fire Ins. Co., 57 Vt., 520). Both the assured and the underwriter must understand that there is a waiver of a

condition, in order to make it operative. The understanding of one party without sufficient cause given by the other, is not enough (Hambleton *vs.* Home Insurance Co., 6 Biss., 91, at 95)."

2 May on Insurance (third ed.), p. 1171, note to sec. 508.

A waiver "never occurs unless intended, or where the act relied on ought in equity to estop the party from denying it. * * * There must be knowledge to establish a waiver."

Diehl *vs.* Ins. Co., 58 Pa. St., 443, 452.

No person can be said to have waived his rights unless he understands he is waiving them.

Kirby *vs.* Ins. Co., 13 Lea (Tenn.), 340–344.

In the case of Insurance Company *vs.* Nixon, 26 C. C. A., 620, it was claimed by the insurance company at the date one of the premiums became due, under the terms of the policy, the agent of the company called upon the duly authorized agent of the insured and the beneficiary, and, showing to him the official receipt for the premium, requested payment thereof. Thereupon the said agent refused to pay it, and stated that it was not the intention of the parties to keep up the insurance, but that they intended to let it go. It was claimed by the insurance company that this amounted to a waiver of the statutory notice and an abandonment of the contract by them. The court in answer to this claim said:

"There are several reasons why the court below was right in refusing to give this instruction. It will be sufficient to state one, and that is that the statute of the State of New York prescribes the condition upon which a policy may be forfeited for the non-payment of premium. The statute is mandatory and controls the contract. *Its provisions are not subject to be set aside or waived either by the company or the assured or by both together.*"

The same question came again before the court in the case of Insurance Co. *vs.* Trimble, *supra*, where the doctrine announced in the Nixon case was reaffirmed and approved.

To the same effect is a decision from the supreme court of Texas (89 Tex., 259):

"In construing this statute, the courts of New York have held that no forfeiture of a life-insurance policy can occur unless the notice provided for in the statute has been given, and that the burden of showing such notice is on the insurance company, and that the insured is not considered in default of payment until, at least, 30 days after such notice is given; and, although the insured may in fact have failed to make any number of payments, he cannot be regarded in the light of the statute as in default, or as having failed to meet his obligation, until 30 days after such notice is given."

Ins. Co. *vs.* Smith, 41 S. W., 680.
Hale *vs.* Ins. Co., 6 Gray, 169.
Quinn *vs.* Ins. Co., 71 Ia., 615.

V.

No Estoppel or Waiver Can be Predicated on Facts or Conduct in Violation of or Contrary to the Charter of the Company or the Laws Regulating Such Matters.

It may be admitted that parties to a contract may waive or be estopped from asserting any provision therein which is solely the creature of their contract. Such provisions they may change or modify at their pleasure; but where it is provided by the charter of a corporation or by general statute that a contract shall be made, altered, or terminated in specified way as a matter of public policy, neither party can set up as a defense by way of estoppel the conduct or statements of the other as a substitute for the method or rule prescribed by statute. This is a public

policy statute. The court of appeals of New York, in the case of Phelan *vs.* Insurance Company, has held that this is a statute creating a public policy.

"We are also of opinion that the notice does not in its terms conform to the statute. Many ignorant and unlearned people seek to avail themselves of the advantages proposed by these companies. The statute is designed for the protection of all classes, and the language it prescribes for notice is intelligible to all. To say that in a declared event 'a policy will become forfeited and void' conveys a meaning easily to be comprehended. To refer to the policy and conditions and say that 'members neglecting so to pay are carrying their own risk' is quite another thing, and while it may be comprehensible to those versed in the language of insurers and accustomed to their phraseology it is not the language of the statute and does not embody the notice which the statute requires."

Phelan *vs.* Ins. Co., 113 N. Y., 147, 150, 151-'2.

The same court in Merriman *vs.* Ins. Co., 138 N. Y., 116, terms it a statute of public policy.

The following authorities hold that it is a public policy statute:

Griffith *vs.* Ins. Co., 101 Cal., 627.
Mullen *vs.* Ins. Co., 89 Tex., 259.
Warner *vs.* Ins. Co., 100 Mich., 157.
Ins. Co. *vs.* Hill, 97 Fed., 263.
Ins. Co. *vs.* Nixon, 26 C. C. A., 620.

The following authorities support the proposition that such a statute is one of public policy:

Insurance Co. *vs.* Clements, 140 U. S., 226.
Insurance Co. *vs.* Ficklin, 74 Myd., 172.
Insurance Co. *vs.* Leslie, 47 Ohio St., 409.
Insurance Co. *vs.* Pollard, 94 Va., 146.
Hermany *vs.* Ins. Co., 151 Pa. St., 17.
White *vs.* Society, 163 Mass., 108.
Reilley *vs.* Ins. Co., 43 Wis., 449.
Chamberlain *vs.* Ins. Co., 55 N. H., 249.
Emery *vs.* Ins. Co., 52 Me., 322.

Then it is clear that the statute under consideration is declarative of a public policy.

The authorities hold that, such being the fact, the defense of a subsequent waiver or estoppel is no more effectual to annul and set aside the statute than the waiver incorporated in the policy.

A case from Indiana is in point. It was an action on a policy of insurance issued in Indiana by an insurance company chartered under the laws of Illinois, and by the terms of the policy the provisions of the company's charter were made a part of the policy. One section of the charter provided as follows:

"Said company may make insurance for any term not exceeding five years, * * * in all cases where the assured has a title in fee-simple, unencumbered, to the building or buildings insured and to the land covered by the same; but if the insured has a less estate therein, or if the premises be encumbered, the policy shall be void unless the true title of the assured, and the encumbrance on the premises be expressed therein."

The company alleged that at the time the policy was issued the premises insured were encumbered by certain judgments, which encumbrances were not expressed in the policy, and that the policy was void. It further alleged that the plaintiff made a written application for such insurance, and that in said application plaintiff represented that the property was free from encumbrances, whereas, in fact, they were encumbered by the lien of said judgments. The reply, to avoid the defense, as stated in the opinion, is as follows:

"In the second paragraph of his reply, the appellant admitted the encumbrances on the buildings insured and on the real estate whereon such buildings were situate, as the same were stated in the third paragraph of appellee's answer, except as to one of the judgments mentioned therein, but he averred that at the time the appellee took his application for the insurance of his property, described in such

application and in the policy in suit, and at the time of the issuing of such policy of insurance of the property insured, the appellee had full knowledge of all said encumbrances on the buildings insured, and on the real estate upon which such buildings were situate, such encumbrances, and each and all of them, having been fully explained and made known to the appellee by the appellant, at and before the time of his making the application for such insurance and before the issue of the policy in suit; and that the appellee, at and before the taking of appellant's application for such insurance, and at the time of issuing to him such policy of insurance, had full knowledge and information of the said condition of the title to such buildings insured, and to the real estate whereon the buildings were situate. And the appellant averred that at the time of his making the application for such insurance, and at the time of the issue to him of the policy in suit, the provisions and conditions of the charter, under which the appellee did business, were not made known to him; neither was such charter in any way made part of such application or policy, so that the appellant might know its provisions, and he never knew the provisions of such charter until after his barn was destroyed by fire, as alleged in his complaint. Wherefore the appellant said that the appellee was estopped from setting up any defense in this action on account of any of said encumbrances on the buildings insured or on the real estate upon which said buildings were situate, or on account of any defect in the appellant's title to such buildings and real estate."

Leonard *vs.* American Ins. Co., 97 Ind., 299, 302.

This defense of estoppel and waiver would have been good under all the authorities if the stipulation against the encumbrances had rested upon the agreement of the parties, but it, being imposed upon the policy by force of law, could not be waived, nor could the company estop itself by conduct to urge the violation thereof. The court holds in regard thereto as follows:

"A corporation, such as the appellee, can only transact its business through its officers or its agents. If the appellee itself, through its principal officers, upon the facts

stated in the third paragraph of its answer, could not make and issue a valid, legal and binding contract or policy of insurance, through an absolute want of corporate power so to do, it would seem to be clear that none of its subordinate agents or solicitors could, upon the same facts, make and issue a valid, legal and binding contract or policy of insurance; in other words, where the question is one of corporate power, if there can be no waiver by the corporation itself, acting directly through its principal officers, there certainly cannot be any waiver where the corporation is sought to be charged by and through the acts of its subordinate agents or solicitors. * * *

"It will be seen from our summary of the third paragraph of answer, that the defense therein stated is based upon the alleged fact that the appellee had no corporate power to make or issue the contract or policy of insurance, declared upon by the appellant in his complaint in this case. * * * In Phillips Insurance, p. 9, it is said, that an incorporated insurance company is 'the mere creature of the act to which it owes its existence, and may be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.'

"Whenever the charter of an insurance company requires that any act shall be done, and prescribes the mode in which such act shall be done, and declares that if the act be not done in the manner prescribed, the contract or policy of insurance shall be void, the company cannot waive the performance of such act in the prescribed mode; *for performance of any condition of the contract, fixed by law, cannot be waived. This has been repeatedly declared to be the law in cases involving the question of double insurance.*"

In Head *vs.* Providence Ins. Co., 2 Cranch, 127–166, the charter of the company provided the method of effecting insurance to be by writing signed by an officer. The company defended an action on the policy on the ground that it had been canceled by subsequent agreement entered into on its part by an *unsigned* letter. Marshall, C. J., places the holding of the court, that the policy was still in force, upon

the want of power in the company to cancel otherwise than by a writing of like dignity, saying:

"It (the company) may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act and to be capable of exerting its faculties only in the manner which that act authorizes."

The supreme court of Connecticut has adopted the same rule in the case of Couch *vs.* Insurance Company, 38 Conn., 181. The insurance company, a Connecticut corporation, insured property of one Couch; its charter contained the following provision:

"If there shall be any other insurance upon the whole or any part of the property insured by any policy issued by said company, during the whole or any part of the time specified in such policy, then every such policy shall be void, unless such double insurance shall exist by consent of said company, indorsed upon the policy under the hand of the secretary."

It was insisted that this provision of the contract (made so by force of the law) had been waived by the company in fact consenting, though failing to endorse its consent on the policy. The court said:

"There was such double insurance in this case at the time this policy was issued, and the consent of the company thereto was not indorsed upon the policy. The charter therefore declared the policy void, and it is void unless the twelfth section is of such a character that its provisions can be waived by the defendant.

"One great source of this evil is the insurance of the same property by different companies, when each company is not aware of the act of the other. To prevent this evil, as far as may be, in the present case, we think the legislature inserted the twelfth section in the defendants' charter, intending thereby to put it out of the power of the defendants to insure property otherwise than is provided therein.

"The evil could not be successfully reached by merely requiring the *consent* of the company to such further in-

surance. There would be no security from misunderstanding, misremembrance and fraud. The difference is great between leaving the consent of the company to be proved by the vagueness and uncertainty of parol evidence, and requiring it to be shown by a formal indorsement upon the policy under the hand of their secretary, which could not be made without consideration and deliberation on the one hand and certainty of the fact on the other (Hale *vs.* Mechanics' Mut. Fire Ins. Co., 6 Gray, 169).

"This difference is all-important in a case like this; and, indeed, if mere consent was all that the legislature intended by the twelfth section of this charter, then no object was accomplished, or could be accomplished, by inserting it in the charter; for if the defendants should make an absolute contract of insurance, without any condition that it should become void if there was or should be further insurance on the property by any other company, during the whole or any part of the time covered by the policy, they would be taken by jurors as having given consent in advance to such further insurance; or the mere fact of such absolute contract would be sufficient evidence with them of a waiver of the condition."

Couch *vs.* City Fire Ins. Co., 38 Conn., 181, 184–'6.

The supreme judicial court of Massachusetts holds directly in line with our contention in the case of Hale *vs.* Mechanics' Mutual Fire Insurance Company, 6 Gray, 169. One Hale took out a policy in a Massachusetts company whose by-laws contained the following provision:

"All policies which may issue from this company, to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it issues; and when a subsequent insurance shall be made by any other company, or by any person, on property insured at this office, without the consent of the president, in writing, and according to the terms in such consent expressed, it shall annul the said policy; and the assured shall be entitled to such return of premium and deposit as is provided in article 23d."

The company defended on the ground that the policy had become void by reason of the fact that subsequent to the issuance of the policy the insured had procured other insurance on the same property, and that the consent of the company to such further insurance had not been indorsed in writing on the first policy. The insured claimed and the jury found as a fact that at the time the subsequent policy was taken out, the insured procured the consent of the president to the further insurance and left the first policy with the president with his promise to indorse his consent in writing thereon, which he failed to do prior to the loss. The insured claimed by reason of these facts the company waived that provision of the policy and was estopped from making the defense that the consent to the subsequent insurance was not indorsed in writing on the policy by the president. In answer to this claim by the assured, this court says :

"Such being the rights of the parties under the contract, it is clear, upon the facts in this case, that the policy was annulled under the fifteenth article of the by-laws by reason of the subsequent insurance procured by Stone and Perry on the property without the assent of the president of the corporation in writing, unless the waiver of such written assent by the president and his verbal consent to such subsequent insurance, as found by the jury, operate to set aside this provision in the by-laws as to this particular policy and render the contract valid, notwithstanding by its express terms, as well as by the clause in the by-laws, it would be otherwise void. * * *

"Nor is this the only restriction on the power of the president. He had no authority to waive any by-law of this corporation. By Rev. Sts., c. 37, sec. 24, and c. 44, sec. 1, the corporation alone had power to establish by-laws 'for their own government, and for the due and orderly conducting of their affairs.' By article twenty-sixth it is expressly provided, that the by-laws 'shall in no case be altered' unless previous notice of such intended alteration be given as therein prescribed, and 'it shall be voted for by two-thirds of all the members present at that meeting.' If

the argument of the plaintiff should be carried out to its legitimate result, it would give to the president the right, in any case, to suspend or change the by-laws by his verbal act and at his pleasure. This he clearly had no power to do."

Hale *vs.* Ins. Co., 6 Gray, 169, 173, '4.

See also—

Priest *vs.* Ins. Co., 3 Allen, 602.
Evans *vs.* Ins. Co., 9 Allen, 329.
McCoy *vs.* Ins. Co., 152 Mass., 272.
Blanchard *vs.* Ins. Co., 33 N. H., 9.
Fayban *vs.* Ins. Co., 33 N. H., 203.
Simpson *vs.* Ins. Co., 38 P. St., 250.

To the same effect is a decision of the supreme court of Wisconsin, 55 Wisconsin, 543, in the case of Luthe *vs.* Farmers' Mut. Fire Ins. Co.:

"The policy was written on the building as a dwelling, and the answer in effect charges that such building was afterwards converted into a school-house, and at the time of its loss by fire it had become and was a school-house, and was used and occupied as such. The prohibition of town insurance companies by sec. 10, ch. 103, Laws of 1872, and sec. 1931, R. S., from insuring buildings of this character without a majority vote of its members, is clear and explicit. It is not contended that if the policy had been written upon a school-house it would have been valid, nor, as we understand the brief of the respondent's counsel, that if the dwelling insured had been converted into a school-house proper that the policy would not thereby have become void. A policy of this company without such vote cannot lie and subsist on a school-house. That a policy of insurance on a dwelling, which was afterwards, during the life of the policy, converted into a school-house, would thereby become void, is clearly within the reason of the legislative prohibition. Such a prohibited policy is *ultra vires*, and becomes so whenever the building falls clearly within the prohibited class of buildings which are not allowed by law to be insured by such a company, whether at the date of the policy or afterwards. *The doctrine of consent and waiver is not applicable to*

such a case, because the law makes the restriction of power, and not a mere regulation of the company."

The distinction between cases like the foregoing and those in which the restriction is only a matter of agreement between the parties is pointed out by the same court in the case of Morrison *vs.* Ins. Co., 59 Wis., 162.

"There is nothing in the charter of the company which restricts membership therein, or in any of its classes, to persons of any particular age. It was competent for the company to admit persons as old as Mr. Morrison in class 'E.' Having that power, it could waive in his favor the restriction of the by-law in that behalf. In this respect the case differs from that of Luthe *vs.* Farmers' M. F. Ins. Co., 55 Wis., 543, wherein it was sought to apply the doctrine of consent and waiver to an act which was prohibited by the charter of the company, and which the company had no power to authorize. It was held that there could be no waiver of a forfeiture in such a case. Had the charter of the present defendant restricted membership therein to persons under fifty years of age, we should have a case like Luthe *vs.* Farmers' M. F. Ins. Co. Were such the case the company could not waive the forfeiture. But we are dealing with no such case."

Morrison *vs.* Ins. Co., 59 Wis., 162, 169.

A case from Iowa is also in point. By the act of the legislature of Iowa, in 1880, chapter 211, Miller's Code of Iowa, 1880, p. 299, it was provided—

"That no action shall be begun within ninety days after notice of such loss has been given. All the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract to the contrary notwithstanding."

The action was brought within the prohibited period. The lower court instructed the jury that—

"If a company has absolutely refused to pay a loss, and informs a policy-holder that it will stand a suit, and will

not pay, or the like, then the law does not require a need less delay, and the policy-holder may at once sue, if it is perfectly clear that the company does not intend to pay and proposes to contest. *Held:* It will be observed that the statute is clear and explicit, and contains no exception whatever, and yet the instruction grafts on or injects into it a very important exception or qualification; and, in so doing, we think the court erred. In a statutory sense, the money was not due on the policy until the expiration of the period named therein. The holder of the policy could not lawfully demand payment until that time had elapsed after the notice had been given. If the maker of a promissory note not due should positively declare and state that he would not pay it when due, this would not authorize the holder to bring an action on it prior to the maturity of the note. The same rule must prevail in the present case. The defendant might conclude to pay, but whether it did or not is immaterial, for the reason that the loss was not due and payable to the plaintiff until the expiration of ninety days after the notice of the loss was given, and therefore the court erred in giving the foregoing instruction."

Quinn *vs.* Capital Ins. Co., 71 Ia., 615, 616.

In this case, as we have shown, when the petitioner asked the respondent to restore the policy by paying up, he could under his contract, as modified by the statute, rightfully refuse. It was not due and would not become due under the law of New York until thirty days after the service of the statutory notice. The company could not legally enforce the payment under penalty of forfeiture until the end of the thirty days after the service of the notice. To adapt the language of the last above-quoted case, the insured "might conclude to pay, but whether it (he) did or did not is immaterial for the reason that the loss (premium) was not due and payable to the plaintiff (plaintiff in error) until the expiration of ninety (thirty) days."

See also Gibbs *vs.* Ins. Co., 9 Daly, 203.

There is another class of cases wherein the doctrine of estoppel or waiver has been urged, and where the courts

have uniformly held that it could not be maintained because contrary to statute or public policy. The first we will notice is from the supreme court of Arkansas (37 Ark., 551). By the law of that State a mortgage of a homestead was void:

"Appellant insists that the clause in the mortgage copied in this opinion estops appellees from claiming any of the aforedescribed lots as a homestead. Has it that effect? We think not. The constitution of 1868, which was in force at the time of the execution of the mortgage, expressly declares that 'the homestead of any resident of this State, who is a married man or head of a family, shall not be encumbered *in any manner* while owned by him,' except with liens for taxes, and with laborers', mechanics' and vendors' liens. Lots four, five and six were the homestead of appellees at the time of the execution of the mortgage sued on; and the mortgage, if anything, was an effort to encumber the homestead, and is in that respect void because it violated the constitution of 1868.

"The fact that any of these lots were or were not the homestead of appellees depended not upon any recitals, statements, stipulations or covenants contained in the mortgage. The actual use and occupation as a home and residence constituted the homestead, and could only be shown by extrinsic evidence. To assert and maintain the right of homestead the appellees must necessarily be permitted to plead and prove this fact. This follows as an inseparable and necessary incident to the rights of homestead guaranteed to them by the constitution. *Any recitals, statements, stipulations or covenants incorporated in the mortgage to prevent the pleading or proving this fact, or having that effect, if any, according to the legal construction thereof, were in violation of the constitution in force at the time of its execution and against its policy, and are void.*"

Webb *vs.* Davis, 37 Ark., 551, 554, 555.

The supreme court of Massachusetts recognizes this distinction:

"The demandant, by her deed, made in her husband's lifetime, undertook to convey to Herbert N. Mason, a son of her husband, and one of the devisees under his will subse-

quently made, all right, title, and interest which she then had or might thereafter have in her husband's estate, expressly referring to her right of dower therein. It is the contention of the tenants, that, under the present existing right of married women to hold, manage, and dispose of their separate property in the same manner as if they were sole, the demandant is now estopped from making demand for dower, or from asserting any interest in the husband's land." * * *

"Nor, while she alone is entitled thereto, is it that separate property which, during coverture, she may manage or dispose of at pleasure, as distinct from that of the husband. The Pub. Sts., c. 124, sec. 6, and c. 147, sec. 16, carefully provide for certain modes by which a woman may bar her right of dower in the estate of her husband during his lifetime. They are by release, which is only to be made to him who holds the estate in which the right might otherwise be asserted. These modes we must hold to be exclusive. * * *

"The instrument signed by the demandant, whether considered as a conveyance or as a contract, is therefore void at law. *If such be the case, it cannot operate against the demandant by way of estoppel in equity. A court of equity cannot take jurisdiction to recognize and give effect to instruments which, under the statute law, are inoperative.*"

Mason *vs.* Mason, 140 Mass., 63–65.

So in this case the company asserts that the policy of insurance was forfeited for the non-payment of premiums, and that Mrs. Sears is estopped to maintain that it is not, notwithstanding that it was not forfeited in the mode or manner prescribed by the statute, though the statute says that "no insurance company shall have the power to declare lapsed or forfeited any policy except in the manner hereinafter provided," and "that no policy shall be forfeited or declared lapsed or forfeited until thirty days after the service of the notice." In the case cited the statutory mode of obtaining release of dower was not followed, though by writing the wife for a consideration purported to sell and re-

lease her dower interest—a thing which it was possible for her to do provided she complied with the statute. She did not comply with the statute; hence no conduct, statement, or contract to that effect could work an estoppel. In the case at bar the policy, as a fact, was not forfeited, nor could the company legally declare it forfeited; but it claims that we are estopped to deny a forfeiture. We claim that the statute under consideration, like the statute of Massachusetts, prescribed the exclusive method of forfeiting the contract, and for the same reasons no estoppel can exist.

Another case from Massachusetts is in point:

"The St. of 1818, c. 105, in relation to the Indians and other persons, proprietors and residents on the plantations of Marshpee and Herring Pond, defined what persons should be considered proprietors; and also enacted that the real estate held by them, as such proprietors, might be disposed of by deed or will (secs. 1, 5). By the St. of 1834, c. 166, sec. 9, establishing the district of Marshpee, it was provided that, upon the death of any proprietor without descendants, all his interest in the lands of the district should escheat to the proprietary, and that any proprietor of land in severalty might devise or sell the same to any other proprietor. The power of a proprietor, in conveying land held in severalty, was thus limited, and he had no authority to convey to a person who was not a proprietor."

One Mercy McGrego, an Indian, sold and attempted to convey property owned by her to an Indian named Jesse Webquish, who was not a "proprietor" at the time of the attempted sale, but subsequently became such. It was held that the deed was void, and that her heirs were not estopped to show that the deed was void. The court said:

"The deed, therefore, of Mercy McGrego to Jesse Webquish, who was not a proprietor, made after the passage of the St. of 1834, was in contravention of law and void. She was incapable of making such a contract, and its execution could not affect her interest in the estate, or the interest of her descendants, who, by virtue of the descent from her, be-

came proprietors, as provided in the St. of 1818, c. 105, sec. 1. Nor did the deed take effect and operate as a conveyance when Jesse Webquish was admitted as a proprietor in 1842, under the St. of 1842, c. 72, which provided that persons having certain qualifications could be admitted as proprietors. The deed being absolutely void, and the title remaining in Mercy McGrego, *neither she nor her descendants were estopped from setting up title in the land, as against Jesse Webquish, although he afterwards became a proprietor; for the doctrine of estoppel has no application to the case of a party incapable by law of making a contract. For the same reason, the St. of 1869, c. 463, removing all disabilities from Indians, cannot affect this conveyance.*"

Pells *vs.* Webquish, 129 Mass., 469, 471–472.

To the same effect is a decision of the supreme court of Minnesota:

"This brings us to the conveyance of July 30, 1870, from Hart to Pritchard. Under the decision of this court in Dickinson *vs.* Kinney, 5 Minn., 332 (409), which, so far as we are aware, has never been disturbed, Hart, by his purchase at his execution sale, took all the estate of Randall (found by the referee to be the fee) in the premises in controversy, subject only to the rights of redemptioners. This estate the county did not acquire by the transaction between it and Hart, for want of capacity. We are unable to see how that transaction could operate in any way to protect the lien of the county's judgment, or to prevent Hart from asserting the estate which he acquired by his purchase. If it could have such operation at all, it must be by an estoppel *in pais*. There is no basis for such estoppel, for both Hart and the county are to be taken to have known exactly what the legal effect of the transaction was. There could, then, be no estoppel *in pais*, within the doctrine of Commissioners of Hennepin County *vs.* Robinson, 16 Minn., 381, or within the definition given in Pence *vs.* Arbuckle, 22 Minn., 420, where it is said that 'an estoppel *in pais* arises when one, by his acts or representations, or by his silence when he ought to speak out, intentionally, or through culpable negligence, induces another to believe certain facts to exist, and such other rightfully acts on the belief so induced, in such manner that if the former be permitted to deny the existence of

such facts, it will prejudice the latter.' (See also Plummer *vs.* Mold, 22 Minn., 15; Shillock *vs.* Gilbert, 23 Minn., 386.)" James *vs.* Wilder, 25 Minn., 305, 312.

To the same effect are—

Merrill *vs.* Monticello, 138 U. S., 673, 694.
Anthony *vs.* Jasper County, 101 U. S., 693.
Harrington *vs.* Stone, 39 Kansas, 176.

VI.

Tender of Passed Premiums Prior to Commencement of Action Was Unnecessary.

1.

It is admitted that the contract was made and the first premium thereon paid, and that the contract was in all respects valid. The contract having once been made, the same could not be forfeited except in the manner prescribed by the statute. The premiums were not due until thirty days after the service of the statutory notice. The insured fully complied with his contract when he paid such premium after the service of the statutory notice. The statutory notice was not served; consequently no second premium ever became due. Hence the insured fully complied with all the conditions of the contract. *There is no condition in the policy requiring the executrix to pay unpaid premiums, but, on the contrary, the policy provides that the company may retain unpaid portion of premiums when it pays the policy.* The above has been fully sustained by every court that has been called upon to pass on the question. The first court that was called to pass on the question was the appellate court of New York. The pleadings were practically identical with the pleadings in this case. In fact we followed that decision, believing that any court that would be called upon to

construe the statute of New York would follow the decision of the highest court of that State, and, more than that, we believe it to be good law.

"*It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action brought the premium that was payable on the twenty-fourth of August prior to the death of insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the insured or her assignee, except to present to the defendant the proofs of death required by the policy.* The death of the assured terminated the contract. The defendant's promise to pay, if it was not discharged, had matured, and the person entitled to the benefits of the policy had only to establish the facts of death within the time and in the manner prescribed therein. The contract was kept in life by force of the statute, until the contingency upon which payment depended occurred. The death of the assured created the relation of debtor and creditor between the defendant and his widow, and the unpaid premium, with interest from the date when payable, was a claim to be deducted by the defendant from the sum due upon the policy. This put the defendant in precisely the same position in which it would have been if the premium had been duly paid (Carter *vs.* John Hancock M. Life Ins. Co., *supra*).

"It was conceded upon the argument in this case that the unpaid premium, and interest thereon was deducted from the verdict, and thus no injustice has been done.

"The judgment should be affirmed."

Baxter *vs.* Insurance Co., 119 N. Y., 450, on p. 453–'7.

In a still later case this decision was upheld by the same court in which all the justices concurred. The following quotation states the necessary facts:

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged

and proved non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served."

De Frece *vs.* Insurance Co., 136 N. Y., 144, on p. 151.

It is so held by the supreme court of California.

Osborne *vs.* Ins. Co., *supra.*

2.

No tender was necessary, because the company had denied all liability on the contract.

The company, having taken that attitude, cannot claim that we ought to pay a premium on a policy that it had already repudiated as forfeited and void. Does the company mean to say now that it was not acting in good faith; that it was trying to mislead us, and that it would have taken the premiums? Surely it cannot take such a position, and if it did this court would not permit it. It is an old maxim of the law that no court will compel a party to do an utterly useless act. The company took the position that the original contract had ceased to exist and that there was no contract. We had a right to and did assume and believe that such was its ground of defense.

The supreme court of Washington, in a case exactly identical with this—Griesemer *vs.* The Mutual Life Insurance Company of New York (this same plaintiff in error)—has held the foregoing to be the law. The opinion, by Mr. Justice Hoyt, is as follows:

"The appellant alleges one other reason for the reversal of the judgment, which it is necessary for us to consider. It was not made to appear from the record that there had ever been any tender of the premium which became due before the death of the assured. And it is contended that, since the payment of the premium was a condition precedent to the policy being kept in force, no action could be maintained

thereon until such condition had been complied with by some one claiming under the policy. This contention is found upon the well-settled legal proposition that an action cannot be maintained upon a contract by one party unless he has complied, or offered to comply, with all the conditions on his part to be performed. There is, however, a well-settled exception to this rule, when it relates to the question of tender of money, and that is that whenever it clearly appears that the tender, if made, would not have been accepted, the contract may be enforced without such tender. And in our opinion the question of tender in the case at bar was within this exception. It appears from the notice sent by the company upon the receipt of proofs of death, that the company entered upon the investigation of the rights of the claimant under the policy and held that they were terminated by the non-payment of the premium. And we think that enough appears to show that the company elected to stand upon the forfeiture growing out of such non-payment, and would have refused any tender of such premium. Especially is this true in view of the fact that they went on to determine the cash value of the policy at the time of the default in the payment of premium. This action of the company, construed in connection with the clause in the policy which provides that from the amount due upon it shall first be taken any sum due to the company, sufficiently shows that the money would have been refused if properly tendered. Hence the action can be maintained without such tender having been made."

Greisemer *vs.* Mutual Life Insurance Co., 10 Wash., 202, on p. 210.

Griesemer, adm'x, *vs.* Mutual Life Insurance Co., 10 Wash., 212.

Sanford *vs.* Ins. Co., 11 Wash., 653–666.

It is thus seen that the highest courts, both of Washington and New York, have held that a tender of premium was entirely unnecessary. Defendant in error, living in the State of Washington, had a right to rely on these authorities as establishing the law of the case and upon which she could rest with absolute confidence, one being the law

of the place of contract, the other the law of the forum. The plaintiff in error was familiar with these decisions when she commenced this action. No court will tell her she was in error in relying upon them confidently as settling the question. Would it not be doing her a great wrong and injustice to dismiss her action and compel her to tender a premium on a contract that the company has repudiated, and that, too, contrary to the laws of the place of contract and the forum as well? Further than this the decisions of both States are in entire harmony with numerous other courts, and among them the following: United States *vs.* Peck, 102 U. S., 64; Equitable Insurance Co. *vs.* Wining, 7 C. C. A., 359; Insurance Co. *vs.* Smith, 5 N. E., 417 (Ohio State).

VII.

It is contended on behalf of the plaintiff in error that even if the New York statute is a part of the policy in suit, nevertheless the New York statute is not to be considered because it is not pleaded. The argument is put in this way: That the suit is upon the policy only, and for the defendant in error to call into action the New York statute in aid of her demurrer is to introduce a departure in the pleadings.

The argument of plaintiff in error upon this point is based upon the decision of the Supreme Court of the United States in the case of Union Pacific Railway Co. *vs.* Wyler, 158 U. S., 285, in which Wyler commenced an action in the *State court* of Missouri, alleging that while at work for the railway company in Kansas he had suffered a personal injury through the negligence of the company in employing an incompetent fellow-servant with previous knowledge of his incompetency. The complaint contained no allegation of negligence on the part of the fellow-servant, but was confined, as above stated, to an allegation that the negligence

was that of the company in employing an incompetent fellow-servant. There was in force at the time a Kansas statute making every railroad company liable for damages done an employé in consequence of any negligence of its agents or by any mismanagement of its engineers or other employés. The case was removed to the circuit court of the United States for the western district of Missouri, where an amended complaint was filed which eliminated the charge of incompetency on the part of the fellow-servant and the averment of knowledge of such incompetency on the part of the railway company, and in which the plaintiff rested the cause of action exclusively upon the negligence of the fellow-servant, averring that the company was liable therefor by virtue of the provisions of the Kansas statute. The amended complaint was filed more than five years after the happening of the accident. To the amended petition the company pleaded the statute of limitations of Missouri, which bars actions for personal injuries after five years. The question before the court was whether the amended petition set up a different cause of action than that alleged in the original petition, for if it did the commencement of the new action was to be regarded as dating from the filing of the amended petition, and therefore the bar of the statute would apply.

The inapplicability of the principles announced by the Supreme Court of the United States in this case can be best pointed out if we test the Missouri case by the case at bar.

If the Missouri case had been brought originally in the Federal court, as was this case, and the original complaint had alleged that the injury was caused the plaintiff while working for the railway company in Kansas by the negligence of the fellow-servant, it is entirely clear not only that the case would have been decided otherwise if the question was raised, but also that such a question would never have been raised in the case. In the case at bar the plaintiff states the

making of the contract of insurance, the payment of the first premium, and the terms of the application upon which it is based, to wit, that the application is made under the charter of the company and the laws of the State of New York; and the further fact that the policy expressly provided that the application should be deemed a part thereof and of the contract of insurance. The allegation of these facts brought into the case the statute of New York. The statute was a public statute of said State, and there is at this day no question but that the Federal court, sitting in Washington, takes judicial notice of the public laws of New York without averment or proof thereof, and that it is not only unnecessary, but poor practice to set out any such public statute in a pleading. Having pleaded a contract of which the general laws of the State of New York were made a part by the terms of the contract, either party to the action was at liberty to claim upon demurrer, or at any other stage in the case, or by any other method, the benefit of any New York statute which was to his advantage. The circuit court of appeals for the ninth circuit has previously recognized this long-standing rule in the case of Merchants' Bank *vs.* McGraw, 59 Fed., 972–977; 8 C. C. A., 420, from which the following quotation is taken:

"The allegation of the complaint that the plaintiff was incorporated was denied in the answer. The plaintiff offered in evidence a certificate of incorporation, and undertook to prove the competency and sufficiency of the same by reference to the statutes of Wisconsin, but by oversight referred to the wrong section of the statutes. The reference was intended to be section 2024, which provides that a certificate, such as that offered in evidence, shall constitute due proof of incorporation. It is sufficient to say in answer to this that it was not necessary to introduce proof of the statutes of Wisconsin. The courts of the United States take judicial notice of all public statutes of the several States of the Union."

Again, the Supreme Court of the United States in the case of Gormley *vs.* Bunyan, 138 U. S., 623, uses this language:

"With respect to the refusal of the court to allow certain other public statutes to be introduced in evidence, it need only to be said that the courts of the United States take judicial notice of all public statutes of the several States."

The case of Junction Railroad Company *vs.* Ashland Bank, 12 Wall., 226 (in error to the U. S. circuit court of Indiana), is particularly in point. In that case there was a New York contract, as in the case at bar, yet the court says:

"With regard to the question what law is to decide whether a contract is or is not usurious, the general rule is the law of the place where the money is payable; although it is also held that the parties may stipulate in accordance with the law of the place where the contract was made. In this case it is conceded by all the pleas, and shown by the special finding of the court, that the place of the payment of the bonds in question was the city of New York. By the law of that State, passed April 6th, 1850, of which the circuit court had a right to take judicial notice, no corporation is allowed to interpose the defense of usury. None of the special pleas allege that the place of payment mentioned in the bonds was adopted as a shift or device to avoid the statute of usury. The device complained of was a pretended sale of the bonds, when the transaction was really a loan. Admitting that it was a loan, it is not denied that it was made *bona fide* payable in New York, hence the pleas cannot stand as pleas of usury properly so called. They must stand, if at all, on the allegation that one or both of the contracting parties was prohibited by the law from making such a contract."

To the same effect is the decision of the circuit court in the case of L'Engle *vs.* Gates, 74 Fed. Rep., 513:

"The Federal courts take judicial notice of the laws of all States, *and it is only necessary that the pleadings show a state of facts to which any statute will apply*, and the statute will be taken into consideration *without averment* or proof."

The pleading was the same in the Baxter case, *supra*, as in the case at bar. The plaintiff introduced in evidence the policy and rested. It was held upon full discussion that the pleading and proof was sufficient to make out a *prima facie* case, which could be overcome only by proof of non-payment of premium for within 30 days after notice.

The holding of the supreme court of New York in the Fischer case, *supra*, is also directly in point to the same effect.

Wherefore it is respectfully submitted that the pleading in the case at bar would have been sufficient if the case had been brought in the State court of New York, and consequently it was sufficient in the Federal court of Washington.

The courts of the United States can and should take notice of the laws and judicial decisions of the several States; and that in respect to these *nothing is required to be specially averred in pleading which would not be so required by the tribunals of those States respectively.*

Pennington *vs.* Gibson, 16 How., 65.

In the Griesemer case (10 Wash.), above cited, the complaint was substantially the same as the complaint in the case at bar.

The distinction which we have endeavored to point out between the case at bar and the Wyler case is, we think, taken and elucidated by the Supreme Court of the United States in its decision in the Wyler case, in which the court say:

"This conclusion is strengthened by the fact that in most of the States the laws of the other States are treated as foreign laws, which must be pleaded and proven. Although this rule is not invariably adhered to, it is a part of the law as administered in the State of Missouri. *The suit here was brought in a Missouri court and was necessarily controlled by the laws of that State.*"

The essential difference in the principle between a case originally commenced in a State court and one instituted in a Federal court is worked out by the Supreme Court in Hanley *vs.* Donohue, *supra.*

At the time the court gave judgment on the pleadings in this case not a single issuable fact alleged in the complaint was controverted by the answer. The allegations of the complaint stood as confessed (except the allegation that the contract was made in New York, concerning which the facts in regard to the execution and delivery of the contract were pleaded in detail in the affirmative matter in the answer), and the plaintiff in error attempted to avoid the effect of this confession by the new matter in its answer. If this matter in the answer then showed a right in the defendant in error to recover of the plaintiff in error, as has been before shown and as is established in the decision in the Baxter case, *supra*, under the rules of pleading as established by the decisions of the court of last resort in the State of Washington, judgment was properly rendered, even though there was a variance between the allegations of the complaint and the allegations of the answer upon which judgment was rendered.

Megrath *vs.* Gilmore, 15 Wash., 558; 46 Pac., 1032.

The circuit court of appeals for the ninth circuit, by Hawley, J., held, upon identical pleadings in the Hill case (97 Fed., 263–269), which is now before this court on certiorari:

"In the first place, the cases cited and relied upon by the plaintiff in error are clearly distinguishable in their facts from the case at bar, in this: that the plaintiff's right of recovery therein rested solely upon another separate and distinct cause of action from the one stated in their complaint. In the present case the right of the defendants in error to recover is based exclusively upon the contract set out in their complaint, to wit, the policy of insurance. The cause of action set out in the complaint was based upon the

identical facts upon which the court gave judgment. There was therefore no departure in this case either from fact to fact or from law to law, and hence the principle contended for has no application to this case. There was no necessity for the defendants in error to plead the statute of New York. The United States courts take judicial notice of all the public statutes of the several States. Moreover, the question of forfeiture was solely a matter of defense. It is not considered good pleading to anticipate matters of defense."

Ins. Co. *vs.* Hill, 97 Fed., 263, on p. 269.

Judge Gilbert, of the same bench, held the same doctrine in the case of Dingley *vs.* Mutual Life Ins. Co. (not yet reported).

VIII and IX

relate to the act of 1897.

Preliminary Statement.

On April 8, 1897, the legislature of New York passed an act, the title of which is: "An act to amend the insurance law and the act amendatory thereof, relative to capital and surplus."

The first section reads:

"SECTION 1. Section sixteen of chapter six hundred and ninety of the Laws of 1892, * * * known as the insurance law * * * is hereby amended to read as follows" (here follows the matter referred to in the title.)

The second and third sections are:

"SECTION 2. Section 92 of said chapter is hereby amended so as to read as follows:

"SEC. 92. NO FORFEITURE OF POLICY WITHOUT NOTICE.—No life insurance corporation doing business in this State shall *within one year after the default* in payment of any premium, installment or interest declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon

the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, *within one year from the failure* to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address *in this State*, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. *No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.* (Italics ours.)

"SEC. 3. This act shall take effect immediately."

The plaintiff in error makes two points upon this statute, THE FIRST (which is discussed herein as division VIII) that—

The act applies to this policy, and the right of action thereon expired, because of the one-year limitation provided by the act, on May 17, 1897, one year after the passing of the May 18, 1896, premium.

And THE SECOND (which is discussed herein as division IX) that the act does *not* apply to this policy, except to dispense with the statutory notice of the statute of 1877 or 1892 (or both), as to the premium payable May 18, 1897. This result is said to come about because (it is claimed) the act of 1897 repeals the act of 1877 and section 92 of the act of 1892 as to all outstanding as well as future policies issued to non-residents of the State of New York.

The first of these points is raised for the first time in the petition for certiorari and brief in support thereof. The second is raised for the first time in the brief on the merits *in this court.* Both are raised in this court for the first time. *Neither was raised in or presented to the court of appeals.* This is shown by the decision of the court of appeals, and the showing will be supplemented by a certified copy filed in this court of the brief of the plaintiff in error filed in that court.

Preliminary Discussion of Points VIII and IX.

The Question of the Applicability or Effect of the Statute of 1897 Should not be Considered by this Court.

This case was submitted to the circuit court on the applicability of the statute of New York of 1877 only. The defendant in error claimed at the trial in the circuit court that the statute of New York of 1877 applied to the contract and governed the liability of the parties. The plaintiff in error contested this claim on the following grounds only:

That the statute of 1877 had no application for the reason that the contract was a Washington contract, and forfeited for non-payment of premiums; that the statute of New York of 1877 did not require the notices mentioned in the act to be served on non-resident policy-holders; that the notice required by the act of 1877 was by an express provision of the policy waived; that no tender of premiums had been made prior to commencement of action; that even if the act applied, defendant in error was estopped from claiming that the policy was not forfeited under the act of 1877; that the cause of action was not properly pleaded, and that there was a departure.

These questions and these only were presented to the circuit court of appeals as grounds for reversal. The opinion of the circuit court of appeals, found in the record, fully sustains this claim. The answer of plaintiff in error (see record) is based on the above points and those only. We will file with this brief certified copies of the brief of plaintiff in error which it filed in the circuit court of appeals, which shows conclusively that the above points were the only ones raised and presented to the circuit court of appeals. The plaintiff in error submitted its case to the

circuit court of appeals for reversal on those points and upon none others. It was never suggested by it at any time prior to the filing of its writ of certiorari here that there was in existence any such statute as that of 1897, much less was any claim made or based upon the statute of 1897. Having submitted its case thus made to a court whose decision is final, except in case of great gravity, etc., it is too late for plaintiff in error to raise the point in this court. It is a rule of practice, which we think is universal, that a party cannot raise a question in an appellate court that he did not raise and bring to the attention of the trial court, except it be one of jurisdiction. In such cases the party has as a matter of right an appeal to the appellate court. With how much greater force should the rule apply in a case where he has no such privilege of appeal as a matter of right, but where the right of appeal lies solely in the discretion of the higher court?

The writ of certiorari is similar to a writ of error to a State court, save that in the latter it is one of right when the question, being one reviewable by this court, is properly presented both to the trial and the supreme court of the State, but if such question is not presented and urged before both the trial and the supreme court the right to such a writ is lost, for the reason that this court will not review a case which is final in the State court unless it affirmatively appears that the questions were raised and pressed upon the attention of the court. This court, we take it, will not exercise its discretion in granting a writ of certiorari on a point not raised or urged either in the trial court or the circuit court of appeals, and we also take it that this court, having granted a writ of certiorari, will refuse to consider or entertain any point which was not presented to the court of appeals, because in that court the party appealing is certainly presumed to have presented his full case; that he has raised each and every question upon which he cares to have a decision or upon which he relies for a reversal. It cannot be

possible that a party has a right to submit a case like this to the circuit court of appeals, whose decision will be final, and, having submitted his case to that court on the questions raised and being beaten, can mend his hold by securing a writ of certiorari and again submitting his case on entire new and different grounds. It is the same in effect as it would be if after submitting his case to a court of final jurisdiction and judgment going against him, he would commence his action in the lower court on the same cause of action and try it anew on different points. In such a case it is held that he has presented his full case and raised every question possible in his favor. Hence the first case is *res adjudicata.*

A point similar to this is decided in Montana Railway *vs.* Warren, 137 U. S., 342, on page 351:

"The question now arises whether our inquiry is limited to matters presented to and considered by that court (supreme court of the Territory of Montana) or should be broadened to all matters that transpired at the trial. Obviously the former. Error is alleged in the judgment of the supreme court of the Territory; and if in all matters presented to it its rulings were correct, it cannot be affirmed that its judgment was erroneous, because there were in the record matters not vital to the question of jurisdiction or the foundation of right, but simply of procedure, to which its attention was not called, and in respect to which its judgment was not invoked. All such matters must be considered as waived by the complaining party. It would be an anomaly, if a party feeling himself aggrieved by the rulings of a trial court could appeal to the supreme court of his Territory and invoke its judgment on certain alleged errors; and when defeated there could transfer the judgment of that territorial supreme court to this and ask a reversal here on its judgment involving matters of procedure in the prior trial to which its attention was not directed. It is fundamental that when the judgment of a court is challenged in error, its rulings alone are open to consideration. Of course if the trial court had no jurisdiction, that is a matter which is always open, and the atten-

tion of the court of last resort may be called thereto in the first instance; but mere matters of error may always be waived and they are waived when the attention of the reviewing court is not called to them. Our conclusion, therefore, is that our inquiry in this case is only in relation to the matters presented to and reviewed by the supreme court of the Territory."

Mr. Justice Miller, in the case of Marine Bank *vs.* Fulton Bank, 2 Wall., 252, at page 258, states clearly the rule we are contending for in these words:

"The counsel for plaintiff in error raises the point, that the action was for trespass on the case for wrongfully receiving the depreciated paper, and that the circular is a sufficient defense to such count. This is undoubtedly true, both as to the nature of the action and as to the effect of the notice, and if it had been in any manner made a point of in the court below, we do not see how we could avoid reversing the judgment. But nothing of the kind was done. * * * It is now too late to object for the first time to the particular form of action."

"The other questions presented by the assignment of errors and argued here cannot be considered, as the record does not show that they were brought to the attention of either of the courts below" (Walker *vs.* Sauvinet, 92 U. S., 93).

The case of Springer *vs.* The United States, 102 U. S., 485, is clearly in point. The following extract from the opinion, on page 593, clearly states the necessary facts and the conclusion of the court:

"Other alleged errors, however, have been pressed upon our attention and we must dispose of them. There is clearly a misrecital in the deed of one of the acts of Congress to which it refers. By the act of the 30th of March, 1864, was clearly meant the act of the 30th of June, in the same year. There is no act relating to the internal revenue of the former date, but the plaintiff in error cannot avail himself of this fact for several reasons. In the first place, the point was not brought to the attention of the court below and cannot therefore be insisted upon here."

"It was insisted also, that when Thorn failed and the dealings between him and the plaintiff ceased, they were bound to notify the guarantor of the existence of the debts due them by Thorn, and for which Bruen was held liable, in a reasonable time after the dealing ceased: That Thorn failed April 10, 1837; and the notice was not given until December 31, 1838; the debts sued for in the first three accounts of the declaration being then due: Therefore, the notice was too late and the defendant discharged. The record shows that this notice was not brought to the consideration of the circuit court. We do not, therefore, feel ourselves at liberty to express any opinion upon the question."

Bell *vs.* Bruen, 1 How., 169, 187.

"Objection is also taken to the validity of the State law upon the ground that it is in conflict with the provisions of the Federal Constitution, which secures to every party, where the value in controversy exceeds $20, the right to trial by jury. Two answers may be made to that objection, either of which is decisive: 1. That it does not apply to trials in State courts. 2. That no such error was assigned in the court of errors and that the question was not presented to, nor was it decided by, the court of errors."

Edwards *vs.* Elliott, 21 Wall., 532, 557.

"In the present action, which was tried before the other was brought, the objection that the contract sued on was *ultra vires*, was not pleaded, nor in any way brought to the notice of the court below. The defendant, therefore, is not entitled to avail itself of it upon this writ of error."

Pullman Co. *vs.* Central Transp. Co., 139 U. S., 62.

In the case of San Piedro Company *vs.* The United States, 146 U. S., p. 120, this court says:

"The district court, as heretofore stated, found for the defendant, and entered a decree dismissing the bill. An appeal having been taken to the supreme court of the Territory, the entire record was transferred to that court. There no new motion to strike out this disposition, or any part of it, was presented, nor were the two motions made in the district court renewed in the supreme court, or action

asked of that court thereon. Obviously the defendant, relying on its success in the district court, with this testimony in the case and before the court, did not deem the matter of sufficient importance either to renew the motions made in the district court or to file additional ones, and so let the case pass to the consideration of the supreme court with all the testimony, including this disposition, unchallenged. But our inquiry is limited to the rulings of the supreme court of the Territory; it is its judgment which we are reviewing. By the appeal the case was transferred as a whole from the district court to the supreme court. The rulings of the former court did not bind or become those of the latter, either as to the admission or rejection of testimony or the decree to be entered. All the testimony taken and filed in the one court was spread before the other, and was apparently proper for its consideration. If the defendant had wished to narrow the examination of that court to any portion of the testimony, it should by appropriate motion have expressed the objectionable parts."

This question of the applicability of the statute of 1897, as we have fully shown, was not in any manner presented to the circuit court of appeals. Why it was not we can only conjecture, but that it was not we have clearly shown. Surely the plaintiff in error cannot claim that it was ignorance of the statute. In fact, it ought not be heard to make any such claim, because the statute now relied upon was enacted by the State of its creation and official residence, and it was bound as a matter of law to know of that act as a law; yet scarcely had the opinion of the lower court been filed before it presented here its petition for a writ of certiorari. At that time, if it cared to deal fairly with the circuit court of appeals, it might have brought the statute of 1897 to its notice by a petition for a rehearing, but, on the contrary, immediately or within a very short time after the decision of the circuit court of appeals, it appeared here with this application for a writ of certiorari, and in that petition for the first time raised the question of the applicability of the New York statute, and then only as

statute of limitations. This is not fair nor proper treatment either of the circuit court of appeals or the defendant in error, who must bear the cost of trying a case here on grounds never raised in the trial here or in the circuit court of appeals.

VIII.

The Action is Not Barred by the Limitation Created by Act of 1897.

The portion of the statute immediately involved in the discussion of this point is (as plaintiff in error says in the brief) the closing sentence of section 2, viz:

"*No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.*"

1.

This is a statute of limitation, pure and simple. "No action shall be maintained * * * unless instituted" * * *

Conceding for the sake of the argument only of this subdivision that the statute is otherwise applicable to the *policy* at bar, and that the prescribed year period had run when the action was commenced, nevertheless it is not applicable to the case at bar, because—

The Bar Is Not Pleaded.

We do not mean by this that the statute need have been pleaded *as a statute*, but the bar of the statute must have been set up as such; otherwise by express provision of law it is waived. This being an action at law, the practice es-

tablished by the Washington statute governs the pleadings. The Washington statutes (2 Hill's Code) applicable are the following:

"SEC. 189. The defendant may demur to the complaint when it shall appear upon the face thereof, either—

"6. That the complaint does not state facts sufficient to constitute a cause of action.

"7. That the action has not been commenced within the time limited by law."

(Subdivisions 1 to 5 relate to other grounds.)

"SEC. 111. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer."

"SEC. 191. When any of the matters enumerated in section 189 do not appear upon the face of the complaint, the objection may be taken by answer.

"SEC. 193. If no objection be taken by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the superior or supreme court."

The plaintiff in error (in its Brief, pp. 77 to 83) endeavors to avoid this point on the ground that where a cause of action is created by a foreign statute which imposes a time limitation upon its enforcement the limitation is upon the right as well as the remedy. From this premise the conclusion is (impliedly) drawn that the rule requiring the defense of the statute of limitations to be specially pleaded (whether by demurrer or answer) is inapplicable. In support of this contention a number of authorities are cited which hold that in such a case the foreign statute prevails over a domestic statute,

permitting a longer period of delay. The cases cited do so hold, but none of them support the conclusion drawn by plaintiff in error and above stated, as the following review of them shows.

In Bear Lake *vs.* Garland an action was begun in Utah to foreclose a mechanics' lien given by the Utah statute, which imposed a time limitation on the action. It was specially pleaded that the action was barred by that statute.

In Hill *vs.* Supervisors, 119 N. Y., 347, the question was whether the general statute of limitations of New York or a special statute (prescribing a shorter period), also of New York, applied. The shorter period was specially pleaded as a bar.

In Hamilton *vs.* Royal Ins. Co., 156 N. Y., 338, a short limitation prescribed by contract was specially pleaded as a bar. The question arose whether a provision in the general limitation statute to the effect that an attempt to commence action should be equivalent to commencement applied. Held, yes; and so, too, if the short limitation had been prescribed by a statute.

In "The Harrisburg," 119 U. S., 199, the premise of plaintiff above stated is held. There is no discussion as to method of raising the question, and it does not appear from the opinion how it was raised, but the record of the case (in the office of the clerk of this court) discloses that the foreign statute was pleaded both by special demurrer and by answer *as a bar.*

In Cavanagh *vs.* Nav. Co., 13 N. Y. Suppl., 540, the action arose upon a foreign statute which imposed a time limitation. This was specially pleaded *as a bar.* The plaintiff sought to avoid it by bringing himself within an exception established by the general statute of limitations of New York. Held, the foreign statute governed and the exception did not apply.

In Daily *vs.* R'y Co., 57 N. Y. Suppl., 485, an action was brought in New York to enforce a right created by a Penn-

sylvania statute, New York having a like statute. The home statute allowed two years, the foreign one year. The running of the foreign statute was specially pleaded as a bar and held a good plea.

In Boyd *vs.* Clark, 8 Fed. Rep., 849, the same question was raised by a special demurrer and decided the same way.

In Taylor *vs.* Iron Co., 94 N. C., 525, an action was brought in that State upon a cause of action created by statute of that State imposing a short limitation. The plea of the statute as a bar was set up in answer and held good.

In Hudson *vs.* Bishop, 35 Fed., 820, the question arose under a Wisconsin statute providing for a guardian's bond, but limiting action upon it against the sureties to four years. An action was brought in Iowa after four years. Held, the Wisconsin limitation governed. The question was raised by a special demurrer (see same case, 32 Fed., 519).

In Eastwood *vs.* Kennedy, 44 Md., 563, a set-off was interposed to recover usurious interest based upon a District of Columbia act (of Congress) giving the action, but imposing a time limitation. The bar of that statute was pleaded in reply.

In Comm'rs *vs.* Bucker, 48 Fed., 533, the objection of the statutory limitation of an act of Congress was interposed by *special* demurrer, and held permissible in that form.

The following cases, cited by plaintiff in error, come nearer the point, but do not support its conclusion:

In Lambert *vs.* Ensign Manfg. Co., 42 W. Va., 813, the action was brought in West Virginia to recover for death occurring in that State, the right of action being given by a statute of that State carrying with it a time limitation. Held that where the lapse of time appeared on face of complaint the objection was reached by a general demurrer. But it is seen by the prior decision of the same court cited in support of it (21 W. Va., 601) that the practice of that State permits the objection of the bar of the general stat-

ute of limitations to be taken by general demurrer when the facts appear on the face of the complaint.

In Barker *vs.* Hannibal R. R., 91 Mo., 86, a Missouri statute gave an action for death of husband to widow if she sued within six months; otherwise to minor children. Held a complaint by widow, which fails to allege that death occurred within six months prior to commencement of action, is vulnerable to general demurrer.

City of Eureka *vs.* Merrifield (Ka. Court Appeals), 58 Pac., 243, follows that case in an action brought in Kansas for death occurring in Missouri.

Palen *vs.* Johnson, 50 N. Y., 49, is like the Missouri case. The right to cover usurious interest was given to the borrower for one year, and for the next three years to public officers. A ruling by the lower court, where it appeared by the borrower's complaint that the action was instituted after the expiration of his year, sustaining a general demurrer to the complaint, was sustained. The remaining citations of the plaintiff in error do not touch the point.

The contrary doctrine has been pointedly held by this court:

"There was no error in not allowing the statutes of limitation of New York and Illinois to be offered in evidence, after the court had overruled the motion of the defendant to be allowed to plead them as a defense. The only way in which such statutes are available as a defense is when they are at the proper time specially pleaded (1 Chitty on Pl., 514, 515; Stephen on Pl., 76, note; Wilson *vs.* King, 83 Ill., 232).

"With respect to the refusal of the court to allow certain other public statutes to be introduced in evidence, it need only to be said that the courts of the United States take judicial notice of all the public statutes of the several States."

Gormley *vs.* Bunyan, 138 U. S., 623.

Retzer *vs.* Wood, 109 U. S., 185 (holding such to be the law in New York).

2.

If the sentence of the statute under consideration means anything, it is that action must be commenced within one year after default. If notice is given and not complied with, action must be commenced within one year after the expiration of 30 days following the mailing of the notice, for the policy-holder is not in default during the 30 days. If notice is not given, action must be commenced within one year after the expiration of *one year* following the due date, for by the preceding provisions of the act (1897) the policy-holder is not in default during the year following the due date. Since no notice was given Sears in 1897, he was not in default under the terms of the act of 1897 at the time of his death, for that event occurred March 30, 1898, less than one year after the due date (May 18, 1897), and this action was commenced less than one year thereafter.

3.

The context of the act confines the application of the bar imposed by the closing sentence to cases arising under the act, and enforces a prospective application only of the closing sentence. The act took effect April 8, 1897. Mr. Sears died less than one year after its enactment. The contract was subsisting at the time of his death, and the action was commenced within six months thereafter.

4.

The discusssion so far has proceeded upon the supposition that the act of 1897 applies to this policy. The contention of the defendant in error that it clearly does not is covered fully by the discussion under the next point.

IX.

The Enactment of the Act of 1897 Did Not Dispense with the Statutory Notice Theretofore Prescribed.

1.

THE ACT OF 1897, IF SO INTENDED, WOULD CONSTITUTE AN IMPAIRMENT OF THE CONTRACT.

In Walker *vs.* Whitehead, 16 Ark., 314-317, the court says:

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement.

"The contract (a policy of insurance) is to be read as though the act (of 1876) had been literally incorporated into it" (De Frece *vs.* Ins. Co., 136 N. Y., 144, 151).

In that case, as in this, the parties are conclusively presumed to have contracted with reference to the law of 1877, and it is as much a part of the contract as though they had inserted the words of the act verbatim in the policy and had made those provisions a portion of the written contract, except, being a statute of public policy, its provisions dominated all others. In this case this statute was brought into the policy both by express stipulation of the parties and by force of the statute itself.

In a prior case, Baxter *vs.* Ins. Co., 119 N. Y., 450, 434, the same court says:

"This statute was a part of the contract in question, and governed the rights and obligations of the parties precisely the same and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

This means exactly what it says. It means that this statute is as much a part of the contract as any other provision. After the statute became a part of the contract its repeal or modification would not affect the contract any more than it would any other portion of the written contract. The laws in force in New York at the time the contract became binding are the only ones that affect this contract, not those in force ten years prior thereto or ten years subsequent. The company is presumed to have excepted the first and subsequent premium and agreed to accept future ones on the theory that its obligation to pay the face of the policy in the event of the death of the insured was wholly measured by the policy and the laws then in force. In case of lapse after the payment of three annual premiums, its liabilities would also be measured by the law of New York of 1879 relative to the reserve. It made its contract expressly subject to those laws. How can it complain if its obligations are thus determined?

If the legislature had by subsequent enactment provided that the insured should have the benefit of all the reserve on his policy instead of two-thirds under the law of 1879, would it not contend that such an act could not be retroactive, and could not affect its contract already in force? It certainly would, and its contention would be sustained. On the other hand, if the law of 1879, in force when a contract of insurance was made, should subsequently be amended so as to give the insured, in case of lapse, but one-third of his reserve on premiums paid or to be paid, could not the insured complain and successfully maintain that no law could be given such retroactive force? Certainly so. A subsequent law could not reach back and make a new contract between the parties nor can it look ahead and release either party from contractual obligations each is bound to perform.

Mr. Sears could also say, by the laws in force at the time I made my contract, and under the construction of those

laws by the highest court of New York, my premium was not due until 30 days after service of the statutory notice. The application for the insurance was on the printed blanks furnished by the company, which contained a provision that the policy applied for was to be made, if at all, "subject to the charter of the company and the laws of New York." If the policy, when issued, contained a provision in conflict with one in the application, then that provision most favorable to the insured must prevail. More than that, any provision of the contract in conflict with the statute thus brought into the contract must be subservient to it. So this statutory provision in regard to notice not only prevails by force of the statute, but also by agreement of the parties. The right to a notice under such an agreement is as much a part of the contract and as much a part of its obligation as any other provision of the contract in favor of the assured. Under this contract the due date of the premium was not the date named in the policy, but was thirty days after the service of the notice. It might be the date named in the policy or any day subsequent, depending entirely on the service of the notice. This is one point wherein the Rosenplanter case is unsound and in conflict with decisions of the New York court. Such a change made as claimed by plaintiff in error and by the court in the Rosenplanter case by the law of 1897 would thus alter the terms of the policy both as to the due date and the method of the forfeiture of the policy. As said in the Baxter case, *supra:*

"The duration and validity of the policy is not dependent on the payment of the premium on the day named therein, but upon payment within 30 days after notice."

Again:

"In the absence of proof, on the part of the defendant, this allegation (of due performance) of the complaint was sufficiently established *within the meaning of the contract*, as

evidenced by the policy and the statute when read together. * * * When the provisions of this statute (1877) *are adopted in* a contract of insurance (we have heretofore shown this statute was brought into the case in the same way as the Sears) for the purpose of modifying the forfeiture clause, these conditions should be so construed as to give the assured the full benefit contemplated."

This language is surely meaningless unless we take the court at its word when it says that the *contract is evidenced* by the policy and the statute together. It means that the rights conferred by the statute were as much contractual rights as those contained in the printed contract, none of which may be taken away or impaired. Speaking of a policy of insurance executed while this statute of 1877 was in force, the second circuit court of appeals, through Judge Wallace, in Hicks *vs.* Ins Co., 60 Fed., 690, uses this language:

"The policies being New York contracts, were of course dominated by the statute respecting forfeitures as completely as though the statutory condition had been explicitly incorporated in them."

Then this statute was not a mere regulation of the insurance companies in respect to declaring forfeitures of policies made while it was in force, as held in the Rosenplanter case, but the statute entered into and became a part of the contract. We think this claim we make is supported by all the authorities save the Rosenplanter case.

The supreme court of Texas says:

"We think the provisions of the New York statute under the facts shown in this case entered into and became a part of the contract between the parties."

Mullen *vs.* Ins. Co., 89 Tex., 259, 261.

The supreme court of Washington, in Swinburn *vs.* Mills, 17 Wash., 611, 615, states this rule clearly:

"It is a principle so often enunciated and so uniformly maintained that the law which is in existence at the time a

contract is made becomes a part of the contract, that it would be idle to cite authorities on the proposition or to further mention it. In this case it is especially stipulated in the mortgage that the laws in force at the time the contract was made should become a part of the contract, but in the absence of such a stipulation the effect would be exactly the same."

This court has so often announced the doctrine we are contending for that it seems useless to discuss it on cite authorities in support of it. But we will quote from the case of Edwards *vs.* Kearnsey, 96 U. S., 595:

"It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms."

This case, as well as the one above referred to from Iowa, was one where the intent of the legislature to make an act retroactive was apparent and so found to be the intent by the court.

This identical question has been presented to the court of civil appeals of Texas in Germania Life Ins. Co. *vs.* Peetz, 47 S. W. Rep., 687 (1898), as follows:

One Langholz was insured by the Germania Company, a New York corporation, in 1876, after the enactment of the New York anti-forfeiture act of 1876. He failed to pay a premium payable on May 12, 1895, the statutory notice of which was mailed him twenty-six days prior to the due date (a timely notice under the act of 1892, but four days too late according to the act of 1876). He died later in 1895. The company defended on the ground that the policy had become forfeited because of said default and notice, claiming that the contract was governed by the act of 1892, not by that of 1876. The application and the policy provided that the contract should be construed according to the charter

of the company and the laws of New York, that being agreed to be the place of contract. The court held:

"The statute of New York as it was at the date of the contract became a part thereof. Phinney *vs.* Insurance Co., 67 Fed., 493; Mullen *vs.* Insurance Co., 89 Tex., 259; 34 S. W., 605; Baxter *vs.* Insurance Co., 119 N. Y., 454; 23 N. E., 1048. As stated in the last case cited, 'the statute was a part of the contract in question, and governed the rights and obligations of the parties in precisely the same way and to the extent as if all its terms and conditions had been actually incorporated into the policy.' The policy involved in that case contained the condition that it should be void upon failure to pay the premium when due, similar to one of the conditions in this policy.

"We are of the opinion that the legislature of New York could not by subsequent acts abridge or take away the insured's right to the particular notice which the law of that State prescribed at the time of the contract. In Carter *vs.* Insurance Co. (decided by the New York court of appeals in 1888), 17 N. E., 396, it seems to be decided that the payment of each annual payment constitutes a renewal of the policy, within the meaning of the term 'renewed' as used in the insurance statutes of that State; and it was there held that the holder of a pre-existing policy which contained no provision as to notice concerning premiums became entitled to notice, after the act of 1876, requiring companies to give a notice in respect to policies thereafter issued or renewed. But we apprehend that the court did not intend by this to decide that, where a pre-existing policy is contracted with reference to a certain notice, the legislature would have power afterwards to dispense with or abridge that right, as would be the case here, if we should hold that the policy became governed by the provisions of the act of 1892 in respect to notice. We agree with appellee in the proposition that the legislature was without power by its subsequent enactments to amend the contract in question, to the detriment of this right of the policy-holder to the notice contracted for, and to substitute therefor another notice not so ample; and inasmuch as there was no forfeiture or lapse of the policy, and therefore it at no time assumed the form of a new contract between the parties, the act of 1892 has no effect in the case. The notice prescribed by the law of 1876 was not given, and the policy

was not forfeited when Langholz died, unless it be true, as appellee insists, that the provision of the statute of 1876 was not intended to apply to policies calling for semi-annual premiums."

Drierson *vs.* Alsop, 27 Gratt., 229.
Farmers' Bank *vs.* Gunnell, 26 Gratt., 131.

2.

The Statutory Provisions Requiring Notice Which Were in Effect at the Time of the Enactment of the Act of 1897 Were not Repealed Thereby as to Existing Policies.

The argument of plaintiff in error amounts to this: The act of 1877 imposed a public-policy obstacle in the way of a certain provision of the contract which the parties desired to make between themselves; the act of 1892 repealed that act, but by section 92 again imposed the obstacle; the act of 1897 is a repeal of section 92 as to non-resident policy-holders; therefore the obstacle was removed prior to the 1897 due date, and the contract came forth as originally intended. The position of plaintiff in error *depends* on the asserted repeals. If act of 1877 is not repealed, or if act of 1892 supplanted it but is not repealed, the proposition advanced by plaintiff in error falls to the ground.

a.

The Act of 1892 Did Not Repeal the Act of 1877 as to Existing Policies.

There is in the act of 1892 an express repeal of the act of 1877, but it is coupled with a saving clause as to certain past transactions. If the Sears policy is embraced within the enumerated past transactions, it is still in force now as then, with the act of 1877 incorporated in it. The policy

of the law favors a legislative intent not to interfere with previously acquired rights. The saving clause is:

"SEC. 291. The repeal of a law or *any part of it* specified in the annexed schedule, shall not affect or impair any act done or right accruing, accrued or acquired, or penalty, forfeiture or punishment incurred prior to October 1, 1892, under or by virtue of the laws so repealed, but the same shall be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such laws had not been repealed."

It is confidently asserted that the making of the Sears policy, embodying the act of 1877 by mutual adoption, as well as by force of law, was an "act done," and the rights of the parties thereunder (as to terms of forfeiture, as well as time of default) were "rights accrued or acquired," "under or by virtue of the act (of 1877) repealed;" that such rights as had not accrued were "accruing" under or by virtue of the said act, and that therefore by legislative affirmation the said "act done," "rights accruing, accrued, or acquired" "shall be enjoyed, asserted, enforced, * * * as fully and to the same extent" as if the act of 1877 had not been repealed.

If the act of 1877 *was* repealed by that of 1892 (as the company claims) its provisions remained a part of the Sears contract by virtue of section 291 of the act of 1892, if not by virtue of their mutual adoption.

b.

The Act of 1897 Did Not Repeal the Act of 1877, Nor Section 291 of the Act of 1892.

The provisions of the act of 1877 as a part of the Sears policy were in force on April 8, 1897 (date of passage of act of 1897). This resulted (disregarding for the moment the theory of contract adoption) either by virtue of the act of

1877 or of section 291 of the act of 1892. If the former, since they remained in force notwithstanding the act of 1892, it is clear that the act of 1897 did not affect them, for it is only an amendment of section 92 and contains no reference to the act of 1877 nor to any contract or right thereunder. If the latter, certainly the act of 1897 contains no reference to section 291 of the act of 1892, but only purports to amend section 92 of that act.

c.

It is argued that the re-enactment (repetition) in the act of 1892 (section 92) of the words "hereafter issued or renewed," which occur in the act of 1877, indicates a legislative intent to bring existing policies under its provisions. Authorities are cited which so state the general rule; but of course the repetition would not have that result if the legislative intent appears from other provisions of the amendatory act to be otherwise. This exception, for which we argue, is recognized in the case of Kerlinger *vs.* Barnes, 14 Minn., 526, from which the following is quoted:

"But it is claimed, substantially, that the language quoted is merely copied from the act of which it is amendatory, and is to receive the same construction in the amended section which it had in the original one; that, therefore, it must be held to embrace all judgments rendered after the passage of the act of 1868 (*meaning the original act*). It is true, generally that when amendments to statutes are made in this form (the form referred to is 'amended so as to read as follows') 'the portions of the amended section which are merely copied without change, are not to be considered as repealed and again re-enacted, but to have been the law all along (Ely *vs.* Holton, 15 N. Y., 585; Burwell *vs.* Tullis, 12 Minn., 575.)' *If, however, it appears that the legislature did not intend merely to repeat or copy the language of the original law, but, although using the same words, intended them to have a different meaning and effect, the rule is not applicable.*" (Parentheses and italics ours.)

That exception, that indication of a different purpose in the act of 1892, is to be found in section 291 thereof, which makes specific provision for existing policies.

d.

The Act of 1897 Did Not Repeal Section 92 of the Act of 1892 as to Existing Policies.

The question as to whether policies existing under the act of 1877 were brought under section 92 of the act of 1892 is material to the case at bar only in the way of an argument, for the provisions of section 92 are as favorable to the Sears policy as those of the act of 1877. The argument which the company builds upon it is that the copying of the words "hereafter issued or renewed" from the act of 1877 into section 92 of the act of 1892 brought existing policies under section 92, and therefore the copying of the same words again into the act of 1897 brought existing policies under the act of 1897. But if the Sears policy was not (as we have endeavored to maintain) brought under section 92, it could not be carried from there into act of 1897 by the mere repetition of the said four words. On the other hand, if it was brought under section 92 of the act of 1892, it does not follow that it was carried from there into the act of 1897, for we find in the act of 1897 even stronger indication of a contrary legislative intent, even stronger reason for applying the exception rather than the general rule as to the effect of copying words indicating a retrospective construction. Section 92 of act of 1892 referred to *all* policies "hereafter issued or renewed," the act of 1897 only to policies "hereafter issued or renewed" to residents of New York. This circumstance is significant of a legislative purpose to give the word *hereafter* its ordinary meaning—to give it the effect of a new enactment—to make it speak for the future only.

In one part of the brief of the plaintiff in error it is argued that the Sears policy is brought under the act of 1897, in another part that it is not, or, to state it more fairly to the company, in one breath it claims the policy is brought under the prospective effect, in another breath that it falls under the repealing effect of the act. It is claimed on behalf of the defendant in error that the act of 1897 left all existing policies as they were, with the law in existence at the time of their execution a part of them, and dispensed with the statutory notice as to future policies to be issued to non-residents. This brings the discussion to the question of the repealing effect of the act of 1897. It amends section 92 of 1892 to "read as follows." There is no word of express repeal. If it repeals, it does so by implication, and the implication arises, if it arises at all, only as to parts of the original section omitted from it, and as to those, only if the implication is unavoidable (12 L. R. A., 50).

"Repeal or no repeal is a question of legislative intention."

U. S. *vs.* Claflin, 97 U. S., 546–549.
Matter of Water Commissioners, 66 N. Y., 413–422.

The company, in its brief, assumes that the amendment of an act "so as to read as follows" repeals all omitted provisions, and the rule will be found laid down so broadly in some cases and text books, and it is upon that assumption that its whole argument on this point turns; but the court of appeals of New York has time and again held the repeal in such a case is *as to the future only* and the omitted parts of the original statute remain on the statute book to sustain past transactions under them. These decisions hold that such is the legislative intent in the State of New York, regardless of any constitutional question as to impairment of vested rights—that is to say, that the rule holds good, though no right would otherwise be impaired.

"The form in which amendments, both of the Code and of the Revised Statutes have generally been made by declaring that particular sections shall be amended so as to read in a given way was adopted for the purpose of adjusting them to the original enactments, so that when the system should, after repeated amendments, become complete, the different parts might be to go without further revision, and thus form a perfect code. The portions of the amended sections which are merely copied without change, are not to be considered as repealed and again enacted, but have been the law all along, and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. The rule contended for would lead to the grossest absurdities. Proceedings which were quite regular when taken, would be made irregular or void by force of the subsequent statute and confusion of every kind would be induced. * * * In short, we attribute no effect to the plan of dovetailing the amendment into the original section, except the one above suggested of preserving an harmonious text, so that when future additions shall be published, the scattered members shall easily adjust themselves to each other. *In other words, we consider the amendment as one equivalent to an independent statute* declaring in general language that an appeal may hereafter be taken from an order granting a new trial on complying with the conditions mentioned."

Ely *vs.* Holton, 15 N. Y., 595–598.

In People *vs.* Supervisors, 67 N. Y., 109, the question turned upon the effect to be given to chapter 664 of the Laws of 1867 and the same act as amended by chapter 525 of the Laws of 1873. The original act created the remedy; the amendatory act of 1873 amended the original act "so as to read as follows," modifying the former act in several particulars. The court held the act of 1873 to be the only law in force, and, further—

"The earlier statute had been merged by being incorporated and united with new provisions in the amendatory act substituted for it. The general rule is that if a statute that repeals another is itself afterwards re-

pealed, the first statute is thereby revived without any formal words for that purpose. * * * With us the amendment of a statute or part of a statute by making the same read as prescribed by the amendatory statute thus incorporating all that is deemed advisable to retain of the old law in the new, is not regarded as a repeal of the parts thus transferred, but from the time of the passage of the new statute the whole force of the enactment rests upon the later statute. Although the former act remains upon the statute book and is not repealed either expressly or by implication, it is no longer the law of the land in respect to new cases that may arise. * * * During the existence of the law of 1873, no part of the law of 1867 was in force or could be referred to for any purpose *except to sustain past transactions under it.*"

The same principle is maintained in the subsequent case of Reid *vs.* Supervisors, 128 N. Y., 364-373, in which the court, in discussing the effect of an amendatory statute using the words "so as to read as follows," holds that "the original section is applicable to all prior sales, and the amendment is prospective in its operation. The original section may be treated as if it was permitted to stand and the amendment had been placed in a separate act applicable to future sales. * * * The amendment did not repeal the code limitations, but left them to apply to past cases and simply made a new rule to apply to future cases."

The principle is again asserted in Peoples *vs.* Wilderming, 136 N. Y., 363 (opinion by Peckham, J.).

"If then there is a repeal, it must be implied merely from the form in which the amendment is made; that the original section 'be amended so as to read as follows,' etc. This form of amending statutes is frequently used, and was adopted as a convenient mode of preserving an harmonious text by incorporating the amendments into the original law and presenting both together; except in this respect an amendment made in this way has no greater effect than if made in the form of an independent statute. * * * A repeal of a statute will not, as to existing rights, be im-

plied merely for the purpose of preserving an harmonious text."

Kerlinger *vs.* Barnes, *supra.*

"Where an act amends a prior act 'so as to read,' etc., the former act may yet be referred to as controlling past transactions."

Endlich, Interpretation of Statutes, sec. 294.

As a general rule for the interpretation of statutes, it may be laid down that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only. Especially should this rule of interpretation prevail where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties, to restrict the assertion of those rights.

Murray *vs.* Gibson, 15 Howard, 421.

It is the very essence of a new law that it shall apply to future cases.

McEwen *vs.* Den, 24 How., 242–244.

Although the words of the statute are so general and broad as in their literal extent to comprehend existing cases, they must yet be construed as applicable only to such as may hereafter arise, unless the intention to embrace all is plainly and unequivocally expressed.

N. Y., etc., R. R. Co. *vs.* Van Horn, 57 N. Y., 473–478.

In regard to the claim made on behalf of the plaintiff in error that the act of 1897 is declaratory of the previous acts, it is a sufficient answer that this court has held that a declaratory act or an act directing how a former act shall be construed is inoperative on the past, though controlling in future.

U. S. *vs.* Claflin, 97 U. S., 546–549.

e.

In Order that an Act be Upheld as a Validating Act, it is Essential that the Intent be Clearly Expressed.

The claim is made in the brief of the plaintiff in error that the effect of the act of 1897 as to existing policies issued to non-residents is to validate the forfeiture provision thereof which had always theretofore been invalid owing to the domination of the New York statutes. The authorities cited in support of the claim are (in the main, at least) cases where the legislature had passed a statute expressly validating certain contracts or classes of contracts which by virtue of a previous statute had been invalid. To illustrate, we refer to Gross *vs.* Mortgage Co., 108 U. S., 477, where the earlier act had forbidden a foreign corporation to take a mortgage on real property to secure a loan of money. The Mortgage Co., a foreign corporation, did so while the statute was in force. Afterwards the legislature passed an act providing that such mortgages should be valid and enforcible.

The doctrine we contend for is supported by the opinion of Judge Hanford in the Hathaway case (Appendix to plaintiff's brief, p. xxxix).

In other words, we contend that the express repeal of such a statute will not validate a contract or provision of a contract before unenforceable, but that it requires some affirmative legislative statement of such intent.

Mays *vs.* Williams, 27 Ala., 267.

Milne *vs.* Huber, 3 McLean, 212–216.

But if in making this claim we go too far, we are clearly right in claiming that an *implied* repeal is insufficient to accomplish that result, or (to minimize our claim further)

that in any event such a legislative intent will not be *presumed* in a case where the act is susceptible of the opposite construction.

Milne *vs.* Huber, *supra.*

Retroactive statutes, if valid, are to be subjected to such a construction as would circumscribe their operation within the narrowest possible limits consistent with the manifest intention of the legislature to be drawn from the language used.

Hedger *vs.* Rennaker, 2 Metc. (Ky.), 255.

We contend that such should be the holding in any event in a case where the earlier statute is adopted by the contract of the parties, so that its continuance as a part of the contract rests not alone upon the force of the statute, but also upon the agreement of the contracting parties.

In conclusion, it is respectfully submitted that the judgment of the circuit court of appeals is correct and should be affirmed.

S. WARBURTON,
Attorney for Defendant in Error.

HAROLD PRESTON,
Of Counsel.

Additional citations that express repeal does not give life to void contracts:

Bank *vs.* Merrick, 14 Mass., 322.

Banchor *vs.* Mansel, 47 Me., 58–62.

Hathaway *vs.* Moran, 44 Me., 67.

Roby *vs.* West, 4 N. H., 285.

Nichols *vs.* Paulson, 6 Ohio, 305.

Jaques *vs.* Withy, 1 H. Blackstone, 65.

APPENDIX.

STATE OF NEW YORK:

COURT OF APPEALS.

CLERK'S OFFICE.

I, William H. Shankland, clerk of the court of appeals of the State of New York, do hereby certify that I have compared the annexed copies of the complaint, case, and exceptions and Exhibit A in the case of John T. Baxter, respondent, against The Brooklyn Life Insurance Company, appellant, with printed copies thereof taken from the case and exceptions submitted on the argument of said case in the court of appeals on the 29th day of January, 1890, and now bound up and contained in volume No. 8 of cases and points for the year 1890, and that the same are true copies of the printed copies of said complaint, case, and exceptions and exhibit contained in the volume aforesaid now remaining on file in this office.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this eighth day of November, A. D. 1899.

[Seal State of New York Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

SUPREME COURT, CATTARAUGUS COUNTY.

JOHN T. BAXTER
against
BROOKLYN LIFE INSURANCE COMPANY.

The plaintiff herein, by Cary & Rumsey, his attorneys, for a complaint and cause of action against the defendant, alleges upon information and belief that at all the times herein mentioned the defendant was and still is an insurance corporation, organized and constituted and doing busi-

ness under and by virtue of the laws of the State of New York and engaged in the insurance of the lives of persons.

That on or about the 24th day of May, 1884, the said defendant, for value received, made an agreement in writing with and issued its written policy to and on the life of Joel J. Matteson, whereby and in and by the terms of which the defendant, in consideration of the payments hereinafter named, agreed and undertook that within sixty days after the receipt by it of satisfactory proofs of the death of the said Joel J. Matteson it would pay to Maria Matteson, wife of the person hereby insured, for her sole use, the sum of three thousand dollars.

That it was agreed on the part of said Joel J. Matteson that in consideration of the issuance of said policy and the making of said agreement on the part of the defendant he would pay to it during his lifetime the sum of twenty dollars and ninety-seven cents each quarterly year, and that up to the time of the death of said Joel J. Matteson the said insured had made the payments upon said policy as agreed with said defendant.

Plaintiff further alleges upon information and belief that the said Joel J. Matteson died at the city of Bradford on the 7th day of September, 1884, and left him surviving his wife, Maria Matteson, for whose benefit said policy was issued and to whom the loss on the same was made payable.

Plaintiff further alleges upon information and belief that after the death of said Joel J. Matteson and on or about the 10th day of March, 1885, the said Maria Matteson caused to be delivered to the defendant proofs of the death of said Joel J. Matteson; that said proofs were delivered to one Jenkins, who was at said time in the employ of said defendant and who was duly authorized by it to receive the same; that the proofs of death so delivered to and furnished the defendant were satisfactory proofs of the death of said Joel J. Matteson and were made in accordance with the directions of said defendant.

Plaintiff further alleges upon information and belief that on or about the 10th day of March, 188[illegible] proofs of the death of the said Joel J. Matteson were delivered to the defendant.

Plaintiff further alleges upon information and belief that more than sixty days had elapsed from the time of the delivery of the proofs of loss, as aforesaid, up to the time of

the commencement of this action, and that the said sum of three thousand dollars came due and payable before the commencement of this action and remains wholly unpaid.

The plaintiff further alleges that before the commencement of this action and prior to the issuance and service of the summons herein the said Maria Matteson, by an instrument in writing, duly sold, assigned, and transferred to this plaintiff the said sum of three thousand dollars and interest due and owing to her by the defendant, and the claim and demand against the defendant for the same, and the right to sue for and collect the same from the defendant, and that the plaintiff is now the owner and holder of said demand and claim.

Wherefore the plaintiff demands judgment against the defendant for the sum of three thousand dollars, with interest thereon from the 10th day of May, 1885, besides the costs of this action.

CARY & RUMSEY,
Plaintiff's Attorneys, Olean, N. Y.

STATE OF NEW YORK, }
Cattaraugus County, } *ss:*

John T. Baxter, being duly sworn, deposes and says he is the plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN T. BAXTER.

Sworn to before me this 29th day of September, 1885.

E. F. KRUSE,
Notary Public.

SUPREME COURT, CATTARAUGUS COUNTY.

JOHN T. BAXTER
ag'st
THE BROOKLYN LIFE INSURANCE COMPANY.

Case and Exceptions.

This action was commenced on the 8th day of September, 1885, by the service of a summons.

The complaint was served on the 4th day of October and the answer on the 5th day of November, 1885. Copies of the summons, complaint, and answer are contained in the judgment-roll.

The issues joined in this action came on to be tried before the Honorable Albert Haight, one of the justices of this court, at a circuit court held in and for the county of Cattaraugus, on the 12th day of September, 1886.

A jury was called and sworn, and the plaintiff, by his counsel, opened the case.

The plaintiff, to maintain the issue on his part, offered in evidence a policy of insurance, dated the 24th day of May, 1884, issued by the defendant on the life of Joel J. Matteson, payable to Maria Matteson, and the same was received in evidence. A copy of said policy is hereto annexed and marked Exhibit "A."

The plaintiff then called as a witness MARIA MATTESON, who, being duly sworn, testified as follows:

I reside in McKean county, Pennsylvania. Joel J. Matteson was my husband. He lived at Dayton, in Cattaraugus county, 1884. There was a time in 1884 when he went to Pennsylvania. I really do not remember what time it was. He went there before I was acquainted with him. *I was married to him ten years ago, the twenty-seventh of May. In* 1884 *he lived in Emporium, McKean county. He died on the 6th day of September,* 1884, *at the town of Bradford. He was complaining all through the month of August.* He went down to the mill and hurt himself. From the middle of August up to the time of his death he was confined to his bed, and during such time he was unable to transact any business; did no business during that time. He was buried in Smith-

port. *I was present at the time of his death and burial. He lived about ten miles from the city of Bradford,* but in the township of *Bradford,* in *Pennsylvania.*

Counsel shows paper to witness.

Question. Is that your signature?
Answer. Yes, sir.

Counsel for the plaintiff offered in evidence the paper referred to, the same being an assignment and transfer by the witness to the plaintiff of the cause of action mentioned in the complaint; which assignment bore date prior to the commencement of this action, and the same was received in evidence.

The counsel for the plaintiff here rested.

The counsel of the defendant then moved for a nonsuit on the ground that the insured had failed to comply with the terms and conditions of the policy by neglecting to pay the quarterly premium stipulated to be paid by the terms of the policy on the 24th day of August prior to the death of the insured.

The motion was denied; to which decision the counsel of the defendant then and there duly excepted.

It was stipulated in open court by both parties to the action that there is due on the policy $3,177.09, for which sum the plaintiff is entitled to a verdict if a recovery can be had in his favor.

The court then directed the jury to find a verdict in favor of the plaintiff for the sum of three thousand one hundred and seventy-seven dollars and nine cents.

To which direction the defendant's counsel then and there duly excepted.

The jury, as directed, found a verdict in favor of the plaintiff for $3,177.09.

The court then ordered that the exceptions so taken be heard in the first instance at the general term, and that judgment be suspended in the meantime; that the defendant have sixty days to prepare and serve case, and that if made and served that the stay continue until the hearing and decision of the motion at general term.

All the evidence and proceedings had upon the trial are above stated.

WILLIAM H. FORD,
Defendant's Attorney, No. 51 Liberty Street, New York.

EXHIBIT A.

The Brooklyn Life Insurance Company of New York.

(Vignette.)

Amount, $3,000. Quar. prem., $20.97.
No. 21839. Age, 35 years.

By this policy of assurance, in consideration of the application for this policy, and of each of the statements and agreements made therein, and under the conditions and limitations hereinafter specified, promise to pay to Maria Matteson, wife of the person hereby insured, for her sole use, if living, and if not living, to the children of said person or their guardian for their use, or if there be no such children surviving, then to the executors, administrators, or assigns of the person hereby insured, the sum of three thousand dollars, at the office of said company, in the city of New York, within sixty days after receipt of satisfactory proofs of the death during the continuance of this policy of Joel J. Matteson of *Bradford*, in the *county* of *McKean*, *State* of *Pennsylvania*.

Subject to the following conditions and limitations:

1st. The quarter-annual premium of twenty dollars and ninety-seven cents shall be paid in advance on the delivery of this policy and thereafter on the twenty-fourth day of August, November, February, and May, in every year, during the continuance of this contract.

2d. If any statement in the application be untrue, or if the insured shall engage in any unlawful occupation, or (unless by written permission of the company) in any occupation forbidden on the back of this policy, or if he shall be convicted of felony, or in case he shall die in consequence of violating law, or by his own act, whether sane or insane, or from the effects of the intemperate use of stimulants or narcotics, this company shall not be liable for more than the next reserve for this policy at the time of death, computed according to the American experience table of mortality, with four and one-half per cent. compound interest.

3d. This policy shall be void if any premium or part of a premium be not paid when due; but if such forfeiture

shall occur after three full years' premiums have been paid, the company will issue a paid-up whole life policy, in accordance with the provisions of chap. 347 of the Laws of 1879 of the State of New York, provided this policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium, as mentioned above.

4th. The provisions and requirements printed by the company upon the back of this policy are hereby referred to and accepted as part of this contract as fully as if they were recited at length over the signatures hereto affixed.

But it is specially agreed that if the death of the insured shall take place after three years while this policy is in force, and not in consequence of any unlawful act or forbidden occupation, then in no such case shall the full liability of the company under this policy be disputed.

In witness whereof the Brooklyn Life Insurance Company have, by their president and secretary, signed and delivered this contract, at the city of New York, in the State of New York, this twenty-fourth day of May, one thousand eight hundred and eighty-four (1884).

W. M. COLE, *President.*

WM. DUTCHER, *Secretary.*

Printed on the back of said policy and referred to therein is the following provision:

6th. This policy is a contract, made and to be executed in the State of New York, and shall be construed only according to the laws of that State, and no suit shall be brought against the company upon this policy, except in the courts of that State, or in the circuit or district courts of the United States, nor shall any such suit be brought after the lapse of one year from the time when the cause of action accrues.

STATE OF NEW YORK:

COURT OF APPEALS.

CLERK'S OFFICE.

I, W. H. Shankland, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of answer made from a printed

copy thereof submitted and filed on the argument of the case of John T. Baxter ag'st The Brooklyn Life Insurance Company, in the court of appeals, on the 29th day of January, 1890, now bound up and contained in volume No. 8 of cases and points for the year 1890, and on file in this office, and that the same is a correct transcript therefrom.

It witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this tenth day of November, A. D. 1899.

[Seal State of New York Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

SUPREME COURT, CATTARAUGUS COUNTY.

JOHN T. BAXTER
ag'st
THE BROOKLYN LIFE INSURANCE COMPANY.

The defendant answers the complaint of the plaintiff:

I. The defendant denies the following allegations of the complaint: That it was agreed on the part of the said Joel J. Matteson that in consideration of the issuance of said policy and the making of said agreement on the part of the defendant he would pay to it during his lifetime the sum of twenty dollars and ninety-seven cents each quarterly year, and that up to the time of the death of said Joel J. Matteson the said insured had made the payments upon said policy as agreed with the defendant, and that the sum of three thousand dollars came due and payable before the commencement of this action. The defendant has no knowledge or information sufficient to form a belief whether the said Maria Matteson made the assignment to the plaintiff alleged in the complaint.

II. The defendant, for a separate defense to this action, alleges that on the 24th day of May, 1884, the defendant, on the application of said Joel J. Matteson and Maria Matteson, by its certain policy of insurance, in consideration of the application for said policy and of each of the statements and agreements therein contained and under the conditions and stipulations thereinafter in said policy specified, did promise to pay to Maria Matteson for her sole use, if living, the sum of three thousand dollars, at the office of the com-

pany in the city of New York, within sixty days after receipt of satisfactory proofs of the death during the continuance of said policy of said Joel J. Matteson, subject, however, to the following conditions and limitations, among others, to wit: That the quarter-annual premium of twenty dollars and ninety-seven cents should be paid in advance on the delivery of said policy, and thereafter on the twenty-fourth day of August, November, February, and May in every year during the continuance of said contract of insurance, and that said policy should be void if any premium or part of a premium should not be paid when due.

That the aforesaid policy and contract insuring the life of Joel J. Matteson are the same policy and contract of insurance alleged in the plaintiff's complaint in this action.

The defendant alleges that on the twenty-fourth day of August, 1884, a premium of twenty-four dollars and ninety-seven cents became due on said policy, and that the sum so due and no part thereof has been paid.

Wherefore the defendant demands judgment that the complaint in this action be dismissed with costs.

WILLIAM H. FORD,
Defendant's Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

William Dutcher, being duly sworn, says he is the secretary of The Brooklyn Life Insurance Company, the defendant in this action, and that the foregoing answer is true to the knowledge of this deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WM. DUTCHER.

Subscribed and sworn before me this 5th day of November, 1885.

JOHN W. JENKINS,
Notary Public, N. Y. County.